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TREATISE

ON THE

LAW OF RENEWALS

IN RESPECT TO

LEASES FOR LIVES RENEWABLE FOR EVER

IN

IRELAND,

WITH THE CASES AND DECISIONS THEREON;

INCLUDING

AN EXTENSIVE REPORT OF THE IMPORTANT AND HERETOFORE UNPUBLISHED CASE OF FITZSIMON *v.* BURTON;

ALSO THE CASES IN RESPECT TO THE

RENEWALS OF ECCLESIASTICAL LEASES IN IRELAND,

WITH

TABLES FOR THE CALCULATION OF FINES.

By JOHN FINLAY, A. B.,

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DUBLIN:

JOHN CUMMING, 16, LOWER ORMOND-QUAY.

1829.

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TO THE

RIGHT HONOURABLE

WILLIAM LORD PLUNKET,

CHIEF JUSTICE OF THE COMMON PLEAS IN IRELAND.

My Lord,

One of the benefits from law publications is, that by reminding courts of their previous views, our judicial authorities are preserved from self-contradiction or contrariety of decision, and enabled to maintain the uniformity of the law.

No branch of our law stands more in need of uniformity of opinion than that which makes the subject of this Treatise. The occasional variances at different periods, between our Equity Courts in Ireland and the Court of dernier resort in England, on the subject of

the Equity peculiar to Ireland, affects the stability of property and law ; and few men could confer a higher obligation on this country, than he who could promote, by legislative aid or otherwise, a uniformity of understanding between these eminent tribunals, on a subject of so much importance.

Much of this variance springs from this cause, that the law peculiar to one country is referrible to a court of appeal in another country, where that law is imperfectly known. Your peculiar and favourable position for this purpose, as an Irish lawyer and a British peer, to whom this peculiar equity is well known, must give you advantages in making it intelligible on a tribunal to which it is not generally familiar, and afford you facilities at least to promote a uniformity of opinion on this subject for the future.

Under this view, I take the liberty of suggesting that the only publication respecting this tenure, and its equity, may have some title to your attention.

Although I have sent forth some books to the public, I am entirely inexperienced in the language of dedication; and shall therefore merely beg permission to inscribe this Treatise to your Lordship, in humble testimony of my profound respect for one who has so much contributed, not only to uphold, but to extend the reputation of the Irish Bar.

JOHN FINLAY.

June, 1829.

PREFACE.

A LEASE for lives renewable for ever is a tenure in a great measure peculiar to Ireland. The nature of this tenure is better expressed by the phrase so usual in this country, namely, "a lease for lives, with a clause of *perpetual renewal.*" It is not a fee, because a fee is the *entire* estate; whereas in this case the estate is *divided,* and the fee remains in the landlord, with the accompanying right to rent and fines: neither is it a fee-farm, because in that case the fee is in the tenant; but it resembles a fee in duration, because it is a continuing freehold; and it depends on the tenant himself, by the performance of his covenants, to make it a freehold for ever, or what is termed "a perpetuity." When the rent is low, and the fine nominal, this tenure will resemble a fee, not only in duration, but value also.

This tenure is unknown, or but little known in England, because, as is subsequently explained in this Treatise, the causes which heretofore operated in Ireland to induce considerable land-owners to admit the tenant into so large a participation of the substantial

value of the inheritance, whilst the landlord retained the inheritance itself, did not so operate in England, where, on the contrary, the law specially protected the inheritor, and discouraged the idea that he should yield up to his tenant the substantial part of the inheritance. It therefore seemed like an anomaly to the mere English lawyer, that the owner of the fee should grant to his tenant what should be deemed in substance, a perpetuity; yet such is the tenure of leases for lives renewable for ever; which, however unusual or unknown in England, was computed to extend over a seventh of Ireland in the time of Lord Chancellor Lifford, and has doubtless since that time much increased through the imitation of a tenure so prevalent.

Ecclesiastical leases, although properly in this country but terms for years, havé also by a process of annual renewal, where the fine took the character of an additional yearly rent, been regarded as leases in perpetuity; and like the former class of leases, treated as such in family settlements and by incumbrancers; the one having been considered as "freeholds in perpetuity;" and the other as "terms for years in perpetuity."

This tenure in perpetuity, so unusual in England, (because the grantors of their fee-farms have parted with the fee, and the tenants in their copyholds are no more in law than tenants at will, according to the custom of the manor,) is protected by an equity in Ireland, which is in all respects peculiar to this country.

Three essential distinctions of this equity are, among other matters, so many proofs of its peculiarity, First, an ancient and universal custom of Ireland, long sanctioned by the highest equity tribunals of Irish law, both in Ireland and England; constituting an important part of the common law of Ireland; as well as an important distinction between the common law of the two countries. Secondly, a statute declaratory of this custom, with an enactory part additional thereto. And thirdly, the institution of septennial fines; established to arrange a compensation for the landlord, by an eminent English lawyer, who filled the office of Chief Baron in Ireland. These three circumstances, namely, the custom, the statute, and the septennial fines, are each unknown to the equity or law of England; and all exclusively characteristic of the equity and law of Ireland, in respect to these leases for lives with clauses of perpetual renewal.

Whether the perpetuity of the renewal of such lease shall be preserved, or shall be cut off, is the point on which all the litigation, of this much litigated subject, has turned.

The consideration of those three prominent badges of this insular equity, should preclude an English barrister in arguing on this subject, before the House of Lords, from stating, as has been too often done, that he did not understand an equity of this description. The consequence of such statements or insinuations has been, to let in the principles of the English equity on this subject, so unfavourable to the principle of re-

garding these interests as perpetuities. It may be possible that a barrister in the circumstances last referred to, may not understand this now provincial equity, a case in which may only cross his experience occasionally and at distant intervals; and the law of which is so much dispersed, a great part of it through Irish reporters, and so unmarked, as not to be distinguished by a heading or notice in any one of the numerous Indexes published in England on either law or equity. It is probable that a barrister so circumstanced, may not understand this Irish equity, but it is no reason that a thing is not to be understood, because an individual may not understand it. It is one of the objects of this Treatise, that the law on this subject should be made accessible with facility. An Irish agent in an equity suit on this subject, will now have an opportunity, in the event of an appeal to the Lords, to present to his English lawyer the entire body of peculiar law on this subject, in the compass of a single moderate sized volume; whereas, heretofore, he could only refer to it as scattered through the eight volumes of Browne's P. C.; the three of Ridgeway; Vernon and Scriven; Schoales and Lefroy; Ball and Beatty; the five volumes of Dow, &c. &c. All the cases on this subject, so dispersed, are here collected and arranged in their order, together with such additions and observations, as inquiry or research could supply, for the purpose of extracting or illustrating the principle. To men of the law profession, this must be at least an accommodation; to the student of Irish law,

it must be a guide on a subject so important to the future exercise of his profession; and on which there was neither treatise nor index; and even as a mere collection of the cases, this work must contribute to spare time to such eminent practitioners as have no time to spare.

To the landlord and tenant in Ireland, this Treatise must also have its advantages. If it be true, as has been stated on authority, that this tenure covers a seventh of Ireland, and by the process of subletting, covers much of that portion, three, four, or five deep; and that each of these estates in Ireland, as alleged by Lord Redesdale, are visited with an equity suit on an average every forty years; an attention to the rights of landlords and duties of tenants, as explained through this work, may materially contribute to prevent such litigation; the following observations will exemplify the sort of information here referred to, as applied respectively to landlord and tenant: and first as to the landlord.

The landlord should always hold in mind, that the fines are the preservatives of his tenure; the landmarks which shew that the fee is in him, and not in the tenant: and that if these be neglected for a considerable time, the law from such protracted neglect, in the non-payment of the fines, would raise a presumption against the landlord notwithstanding the payment of rent, that the fee was in the tenant and not in the landlord, and thus change the tenure into a fee-farm. Such would be the consequences of a protracted

neglect in the payment of the fines, and therefore it is his duty to enforce renewals if he wishes to preserve the estate of his family.

He therefore ought to call in the fines regularly on the drop of the lives, and begin with the drop of the first life; he has the less excuse in neglecting this duty, because he may perform it through his agent in respect to all his tenantry. He should request payment of the fine once or oftener before he makes the demand directed by the statute: that demand need not be expressed in any formal language; but it would be proper, although not essential, to state that in the event of non-compliance with the demand, the landlord would refuse a renewal to the tenant.

The statutable, as well as the previous demands, should all be made in a manner and by persons capable of giving proof thereof; and this observation applies with equal force to the previous demands, as to the statutable one; because, should a bill be filed by the tenant to compel a renewal, the previous demands would by taken into account by a court of equity, in ascertaining how far the tenant had complied with the statutable demand within reasonable time thereafter; and the greater the number of such previous demands, and the longer the distance between them, the less would be the time which a court of equity would grant to the tenant in complying with the statutable demand, and the more easy would it be to the landlord to cut off the perpetuity, if the unpunctuality of the tenant had transgressed the reasonable period for payment thus limited by these previous demands.

When the landlord has thus made his demand, if there be another life or two lives still surviving, he cannot of course eject the tenant whilst any of these exist; and as the one or both may last for a considerable time after the demand had been made, it might be necessary in such case, if he persevere in his intention to cut off the perpetuity to file a bill, in order to perpetuate the evidence of the demand; and such a proceeding would of course be essential if either of the lives in the lease, promised to outlive the witness on whose testimony the proof of the demand depended. In this respect the Tenantry Act ought to be amended, by giving to the landlord some cheap and convenient mode of keeping the evidence of the demand alive, either by filing the affidavit of the witness to the demand, or by a summary application to the court, or some such mode.

If the landlord decline to make such demand he extends to the tenant the indefinite equity which existed before the statute; and so long as that indulgence continues, at least whilst any of the lives last, the tenant is not considered in fault; for his laches only begin to run when his unpunctuality has transgressed the bounds of reasonable time for payment after the statutable demand had been made. The landlord should avoid this state of things by making a demand, or by having it made, when possible, on the drop of every life; but this may not always be possible; long minorities, or the indulgence of his predecessors, may introduce him into the estate under the circumstances

of more lives than one having been dropped; in such case he should make the demand not only of the renewal but of the septennial fines, with interest on both, provided the non-payment had been sufficiently protracted as that a claim for septennial fines had arisen; but the landlord or his agent in such cases should avoid to state the amount of the sum demanded; because should his calculation be incorrect, it might be an excuse to the tenant for protracting his laches; and for the same reason the landlord or his agent should avoid to mix up the demand with any treaties in respect to other subjects, or any considerations *de hors* the demand. The burden of the correct calculation of the fines, and the tender and payment thereof, lies upon the tenant. The landlord may demand his rent as well as his fines; and if the tenant be driven to the necessity of filing a bill to compel a renewal, the Court of Equity will not grant him a renewal unless on the payment of the rent as well as the fines; but if the tenant tenders him the fines alone, it might be advisable for the landlord to accept them, and resort to his other remedies for the rent, rather than file a bill for a non-compliance with the statutable demand, where he had refused the fines because the rent did not accompany them, the state of the law on this point being left unsettled by Lord Manners in the case of *Jessop* v. *King*, and still undetermined.

As to the service of the notice demanding payment of the fines, it ought to be personal if possible where the tenant is known. Lord Redesdale, in his judgment

in *Jackson* v. *Saunders*, *vide post*, 177, is reported to have said, that if the landlord knows the tenant, it would be very difficult to say, that he must not make the demand personally. It is clear, however, that that difficulty has been encountered and overcome, for the decision in the late case of *Fitzsimon* v. *Burton* is express upon the point, that a service may be sufficient although it be not personal.

When the tenant is unknown, or there be a difficulty in discovering who the tenant is, a particular form of substituted notice is given by the statute; and it is considered by Lord Redesdale an omission in the act of parliament that some similar facility has not been afforded, where the tenant is at a distance or out of Ireland, or even where the landlord may be at a distance or out of Ireland, to effect service upon the tenant without the necessity of a special messenger, the expense of which may exceed the amount of the fine to be demanded. So long however as the law remains as it is, its rules must be collected from the latest decisions, and those of the court of dernier resort must be taken as paramount to all others; and the rule in this particular is now established to be, that personal demand is not essential, although it is always desirable, because a court of Equity will never act upon it unless the court have good grounds to be persuaded that the tenant received the notice, although there may not be direct evidence to that effect.

Attention to these particulars by the landlord or his agent will always enable him to protect the fee, and

save the estate to his family or assigns. Most of these precautions may be exercised by the agent; and the fee can never be lost or endangered, provided that the agents do their duty, during minorities or the absence of proprietors, by enforcing the fine regularly on the drops of the lives.

The next considerations are applicable to the tenant. Having shown how a particular line of conduct in the landlord or his agent may contribute to keep the fee in himself, his heirs or assigns, it next remains to suggest such conduct applicable to the tenant, as may contribute to preserve the perpetuity to himself, his heirs or assigns. And first as to fraud. He should always keep in mind that any fraud applicable to him as against his landlord, will, if there be *any* laches, disentitle the tenant to a renewal, and cut off the interest of innocent sub-tenants, as well as destroy the foundation and security of family settlements, and *bona fide* incumbrancers. In fact the preservation of the perpetuity can only be secured by fair dealing on the part of the tenant towards his landlord; because a court of equity gives a great latitude to its acceptation of the word *fraud:* for instance, the concealment by a tenant from his landlord of the death of a *cestui que vie*, is deemed fraud in the tenant, and a sufficient cause for cutting off the perpetuity. It would therefore be better both for landlord and tenant that the *cestui que vies* nominated in the renewal lease, should always be persons whose station was accompanied with such a necessary notoriety as that the drop of the life cannot be matter of concealment.

If the tenant be also the agent to the landlord, and in the course of his duty of giving notice to the other tenants to pay in their renewal fines, declines to gives notice to himself, as Lord Redesdale expresses it, such conduct is now deemed fraud in such tenant, sufficient to cut off the perpetuity.

But even where no fraud in any sense can be imputed, this perpetuity is often liable to be lost by mere unpunctuality in the payment of those fines by the person whose duty it is to pay them. The demand may be made on the drop of a single life, and after that, according to the current of modern decisions, the tenant has not a moment to lose in making the payment, if he wishes to keep the perpetuity out of danger. That payment must be made within reasonable time after that demand. What that reasonable time is, lies in the breast of the chancellor or the equity court, by which the cause may be tried, to be measured by such courts according to their view on the circumstances of the case. Lord Clare thought that six months might be a fair average of such time. But later decisions have established that though it may be more it may also be less; and it has been lately said, on high authority, that three months might be sufficient; that is, that a delay of three months in the payment of the fine or fines after the demand, might cut off the perpetuity. If the tenant has received the notice of the demand, let him avoid to wait for personal service, because if the court be satisfied that it came to his hands, it will now hold that service sufficient to cut

off the perpetuity if he has not complied with it. Let him not wait for a demand from his landlord if he has got one from his agent; let him not special plead on the wording of the demand, for no particular form of words is now deemed necessary; let him not deem it insufficient because it does not demand a sum specific, or any sum; let him always remember that the burden of the calculation lies not on the landlord but on the tenant: that the latter must calculate the renewal fines with interest thereon, and the septennial fines with interest thereon, and tender all within time, else the perpetuity will be lost; let him beware how the three lives are suffered to run out, because in the opinion of some authorities that fact would disentitle him to a renewal; but whether or not it would be in the opinion of all authorities a most important ingredient in the case against the tenant. Let him tender his rent along with his fines; because although the question be undetermined whether that be essential or not, yet non-payment of his rent would be an important circumstance against him when he was applying for a favour to a court of equity, and asking it to repair the consequences of his own breaches in his contract with his landlord; let him remember that equality is equity; that when he asks equity he must do equity; that he should keep his covenant to pay his rent when his application is to repair his own laches. Let sub-tenants and incumbrancers be also watchful that the fines be paid by that person whose duty it is to pay them; and let all tenants and sub-tenants hold anxiously in view,

that according to the strictness of modern decisions, the life of this perpetuity will be most safely preserved by vigilantly watching the lamp of life in respect to each of his *cestui que vies*, and supplying its suitable aliment to the former, regularly as each of the latter may expire.

Let the tenant remember that in the event of the three lives having dropped, the ejectment brought by the landlord is sufficient demand under the act of parliament; and that he should beware of taking defence to the ejectment, as it is setting up an adverse possession, and a denial of his landlord's title, which courts of equity have lately considered an important fact against the tenant; and justly so, because he uses his own defaults, and perverts his landlord's indulgence into a means of depriving that landlord of his estate.

Finally, this perpetuity is made conditional on punctuality in the tenant; and therefore he cannot be too careful of a tenure so valuable, yet so critically circumstanced; nor can his sub-tenants or incumbrancers be too circumspect respecting his punctuality on this important particular. This punctuality will be the best security for the rights of all the parties. It will preserve the fee to the landlord, and the perpetuity to the tenant; whilst the fine will be paid by the particular tenant against whom it first became due; and received by the particular landlord to whom it first became payable.

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A TREATISE

ON THE

LAW OF RENEWALS,

IN RESPECT TO LEASES

FOR LIVES RENEWABLE FOR EVER,

IN IRELAND.

A LEASE for lives renewable for ever, is, in many respects, *a perpetual lease;* and it is in every respect a perpetual lease, when the tenant performs his part of the agreement. It is not a fee; because the fee remains in the landlord; but it resembles a fee in duration, because it is a continuing freehold, and it depends on the tenant himself to make it a *freehold for ever;* or, what is commonly called "a perpetuity." If the rent be low and the fine nominal, a lease of this kind will not only resemble a fee in duration, but in value also.

A lease for lives renewable for ever, &c. &c. &c., what.

It is necessary to distinguish carefully this very peculiar tenure from those other legal tenures to which it approaches most nearly, and with which therefore, it is most liable to be confounded. To distinguish this perpetuity from a grant in fee, or a grant in fee-farm, it is necessary to look strictly at what is a fee, and what a fee-farm.

An estate in *fee simple* is the entire and absolute property of the land; from which it follows, that no person can have a greater estate or interest; and whenever a person grants away an estate in fee-simple, he cannot make any further disposition of it, because he has already granted the whole and entire property, and consequently nothing remains in him.—*Cruise, Dig.* 18.

An estate in fee-simple is the entire property.

Fee-farm.

Fee-farm, feudi firma, is a compound of *fee* and *ferme*, *prædium*, and signifieth in a legal sense, land held of another in fee, that is, in perpetuity to himself and to his heir, for so much yearly rent as it is reasonably worth, more or less, so it be the fourth part of the worth.—*Britt.* c. 66. n. 4.

Fee-farm rent.

A *fee-farm rent* is a perpetual rent, reserved on a conveyance of the fee-simple. And Lord Coke says, that, if a rent be to the whole value of the land, or to the fourth part of the value, it is called a fee-farm. Mr. Hargrave has observed on this passage, that the true meaning of a fee-farm is a perpetual farm or rent, the name being founded on the perpetuity of the rent or service, not on the quantum. And, that the sometimes confining the term of fee-farm to rents of a certain value probably arose, partly from the statute of *Gloucester*, which gives the *cessavit* only where the rent amounts to one-fourth of the value of the land; and partly from its being not usual, on grants in fee-farm, not to reserve less than a third or fourth of such value.—3 *Cruise*, *Dig.* 310.

This lease distinguished from fee and fee-farm.

The above descriptions of feé, and fee-farm, are sufficient for the purpose of distinguishing them from the lease for lives renewable for ever: the fee and fee-farm are both perpetuities absolute; and the fee itself is conveyed thereby: but the lease for lives renewable for ever, is not a perpetuity absolute, but contingent; contingent upon the circumstance of the tenant fulfilling his part of the agreement; and it is a perpetuity not in fee, because the fee remains in the lessor.

The object of the parties to these leases.

"The meaning of the parties to those contracts is to secure a continuance of the tenure and rent, and payment of the fines, and to prevent a conversion of the tenure, by enjoyment without renewal, into a fee-farm: for, notwithstanding the payment of rent, if there was to be no renewal from time to time, the presumption of a fee-farm would arise; and where the covenant for renewal is upon a pepper corn fine, which is often the case, the preservation of the tenure, and of the remedies for the rent, must be the only object. In the original contract for such leases, the object on the part of the landlord is the enjoyment of a clear rent, and, in many cases, an occasional fine, seldom more than half a year's rent, sometimes very small, with the consequences of the fee remaining in him: and, on the part of the tenant, the contract is for the perpetual enjoyment of the land, and an encouragement to make such expensive improvements, as could not be expected to be

made, but with a view to such continued enjoyment."—*Judgment* of *Lord Redesdale* on the case of *Lennon* v. *Napper*.—2 *Scho. and Lef.* 682.

The cases in Ireland on this subject rest upon a peculiar local equity. It has been computed that one-seventh of the whole landed property in Ireland is held on leases renewable for ever; they have been uniformly the subject of family settlements, mortgages, and other securities for money, and the owner of such an estate has always been liberally dealt with, as if he were the owner of the fee. It has accordingly been considered as part of the policy of this kingdom, to protect and preserve the rights of tenants to renew, although they should have neglected to renew at the proper time, and to permit them to renew under circumstances of mere neglect on condition that indemnity shall be made to the landlord.

In Ireland a seventh of the land held by this tenure peculiar to Ireland.

The legal history of this tenure, peculiar to Ireland, and affecting so much of its landed property, has been given by Lord Chancellor Lifford in his judgment on the case of *Lysaght* v. *Boyle*.

History of this tenure.

"It may be proper therefore not to speak merely on the case now before us, but also to explain the history of this tenure in this kingdom, and the determinations concerning it in our courts. How long it has prevailed I do not pretend to say: it might have been first introduced in the north; but in the south I believe it has prevailed since the time of the great Earl of Ormond; who, in order to people his vast estates in that part of the kingdom, and to invite a respectable and improving tenantry, introduced this tenure: it had the effect he desired; and in the nature of the thing, these leases have a tendency to create a respectable and improving tenantry. It obtained, till it had acquired these tenants great respect, and very valuable properties, inasmuch as they were considered to have a perpetual interest. In this I am warranted, not only by the express words of the statute, but by what it recites to have been decided by courts of equity, and countenanced by the declaration of judges. These leases then were considered as perpetual interests, and upon that principle they gained ground, and became a fund for settlements of every kind, for mortgages, and other securities for money. If a man had one of these leases, there would have been no more doubt of lending him the money, than if he had the fee. For some time, however, great difficulties did arise in courts of equity concerning these leases. Tenants,

By Lord Lifford.

These leases considered as perpetual interests.

like other men, are subject to that misfortune attending on human nature, of neglecting their own affairs. I believe experience and observation will justify the remark, that mankind in general are extremely negligent about what concerns themselves; partly by business of another kind, partly by pleasure, they are diverted from looking into their own private affairs, and paying them that attention which they require. Hence it happened, that tenants neglected to make renewals upon the fall of the lives, and were guilty of great laches: and landlords thereupon brought ejectments, and the tenants resorted to courts of Equity for relief; and courts of Equity, where the breach was made up by an adequate compensation, thought that they were entitled to relief; but still considerable difficulties arose in estimating what should be a compensation, until that great man, Lord Chief Baron Gilbert, who presided in the court of Exchequer in this kingdom, struck out the compensation of septennial fines; considering a life as equal to seven years, upon the idea of the act which says, that if a man is not heard of for seven years, he is to be presumed dead. That compensation is a fine for seven years with interest, accordingly in the case of *Anderson* v. *Sweet*, 1717, he decreed a renewal to the tenant, upon payment of septennial fines and interest; and this decree was affirmed by the lords in 1722, *vide* 2 *Brown*, p. c. 430."

Septennial fines created by C. B. Gilbert.

"Courts of Equity were very glad to lay hold of that rule, and in every case that came before them afterwards, they held that the tenant was entitled to a renewal upon those terms, except in cases of fraud or dereliction. There is a long string of cases that came into public discussion in the courts, some with, and some without negative clauses; for in some of these leases was inserted an express proviso, that if the tenant neglected to renew within a certain time, he should not have a right to call upon the landlord for a renewal. But yet notwithstanding that clause, courts of Equity adopted the same rule, in that very extraordinary case, as coming under the idea of compensation, and in that case, which has made so much noise, of *Murray* v. *Bateman*, which came before me in 1776, I had a great number of those cases laid before me, besides those that had been cited at the bar. I directed a search to be made, and I found that they abounded in the courts. I also inquired of the judges, of the ablest men, and oldest practitioners in the hall, and they all agreed that the uniform practice was to decree renewals in all cases except where

there was fraud or dereliction on the part of the tenant. Some of those persons are now dead, Lord Annaly, Mr. Justice Robinson, Mr. Malone, Chief Justice Patterson, and others, who were perfectly acquainted with the determinations that had been made, and they said moreover that the cases which had passed *sub silentio* were *innumerable.* In consequence of this general remonstrance, I formed my opinion, notwithstanding any ideas upon the subject that I might have brought with me from England, where this kind of tenure is not known: accordingly I decreed a renewal. I did consider that there was a *local equity*, and as I have often heard it called, the *old equity of the kingdom.* We all know the fate of that decree; upon an appeal to the House of Lords in England, it was reversed. I am satisfied that the principles of it were not understood there. They were unacquainted with that *local equity*, and that it was the intent originally of the parties to convey a a perpetuity: all this I say was unknown to them; they had no such tenures; no such determinations in that kingdom. Some very respectable and eminent men, who concurred in that reversal, with whom I have since held conversation, have told me that they had altered and changed their opinion. They said that according to *English* principles, the reversal was right, but that taking into consideration the *usage in Ireland*, and all the circumstances of the case, it was wrong. The voice of the people expressing a dissatisfaction with that determination of the Lords, and a general alarm in consequence, brought the point before the legislature, and the *old equity* was revived by the act of 19 and 20 of the king, ch. 30. After that reversal, and before the act, there were one or two cases which came before me, in which I refused to give relief; they were cases of strong neglect; all the lives were gone. I considered the determination of the great court of *dernier resort* (as the House of Lords of Great Britain then was,) and I hope I always shall consider the determination of the court of *dernier resort* as declaratory of the law of the land; and that I was not at liberty to set up my own opinion against it, and make a decree which was sure to be reversed; and indeed, it would have been cruel to the party. By the act the old equity was revived: indeed even though it had never been made, after the supreme jurisdiction had been restored to this house, I would have no hesitation in determining as I had done before in *Murray* v. *Bateman*."—*Vern. & Scriv.* 143.

The practice to decree renewal except fraud or dereliction in the tenant.

The old equity of Ireland revived by statute.

The Editor has selected the last-mentioned extract from the judgment of Lord Lifford, as affording a clear and simple view respecting the nature and origin of this peculiar tenure, affecting so much of the landed property in Ireland, as well as those other rights resulting from settlements and incumbrances on that property: and the Editor apprehends that there are no other passages to be found through the cases or judgments on this subject, giving so satisfactory a description of this tenure.

Cause for the introduction of this tenure, suggested by Lord Mountmorres.

"The time of the introduction of the tenure by leases renewable for ever, into Ireland, has not been accurately ascertained, as far as I have been able to collect. The late Lord Chancellor Lifford said they prevailed in the southern part of the kingdom from the time of the great Earl of Ormond; who in order to people his vast estates in that part of the kingdom, and to invite a respectable and improving tenantry, introduced this tenure, *vide Vern. and Scriv.* 143. Lord Mountmorres says this tenure was first introduced in Ireland soon after the revolution, by the late Duke of Ormond, who was much in debt, that he might raise large sums by fines, and thus borrow money at the expence of posterity, *vide Hist. Ire. Par.* 1 *vol.* 370 *in notes.* But it has certainly been known in Ireland at an earlier period than the revolution, for in the case of *Boyle* v. *Lysaght*, the original lease was made in 1660. In the case of *Lord Ross* v. *Worsop*, the lease was dated in 1682, and in *Burnell* v. *Lord Inchiquin*, which was heard in the court of Chancery in Ireland, *Hil.* 1794, the lease was dated in 1668. Indeed the bill in this last case suggested not only a period, but a cause, of the introduction of this tenure, for it stated that property was very unsettled in Ireland, from 1643 to 1668, from the tumults and confusions which took place; during which period, it was the custom of the Roman Catholic gentry to apply to some nobleman, or man of consequence, to pass patents for the estates of such Roman Catholic gentry, for the purpose of securing them for the proprietors thereof; that upon such occasions, either declarations of trust were executed, or leases for lives or years, with covenants for perpetual renewals at a very small rent. M. S. *cases.* It appears probable, however, that the tenure came into more general use about the time stated by Lord Mountmorres, and for the reasons he has mentioned; for the Duke of Ormond, in 8 and 9 William III., obtained an English act of parliament to enable him to raise fines by making

By Ridgeway.

leases for lives renewable for ever of his settled estates in Ireland, for payment of his debts. But at whatever period, or from whatever motive it might have been introduced, it is not surprising that the people of this country were alarmed at some judicial determinations taking place in England, tending to shake a title under which it is said a seventh part of the landed property of this kingdom is held.—1 *Ridg. Par. Ca.* 178.

The law respecting this tenure in Ireland is much dispersed through a variety of reporters. It is the object of the present treatise to bring these cases into one view; and to arrange them with such observations as research or inquiry may supply.

Cases on this tenure twofold, those before and after the tenantry act.

The cases on this subject admit of a distinct and simple division, into the two following classes: first—the cases which preceded the tenantry act; and secondly—those which followed it.

The *tenantry act* in Ireland, so called from its paramount importance, is the 19 and 20 Geo. III. c. 3.; and this division of these cases in respect to this statute, was adopted by Lord Redesdale in his learned and very explanatory judgment, given in the case of *Lennon* v. *Napper*. The cases before the statute, which are few, will afford a view of the common law on this subject, and that an anomalous description of common law, namely, a common law peculiar to Ireland; and perhaps the only class of common law unknown to England: the Editor calls it common law, as being the custom of this kingdom, and recognised as such by its highest law tribunals; and he calls it an anomalous description of common law; because that custom so pervading Ireland, was unknown to the law of Great Britain.

The second class of cases, namely those which follow the statute, will give a combined view of the statute and common law together.

The reported cases before the statute as noticed by Lord Redesdale, are as follows:—*Sweet* v. *Anderson*, 2 *Bro.* P. C. 430, *Ross* v. *Worsop*, 4 *Bro.* P. C. 411, *Pendred* v. *Griffith*, 4 *Bro.* P. C. 512, *Charles* v. *Rowley*, 6 *Bro.* P. C. 73, *Kane* v. *Hamilton*, 1 *Ridg.* P. C. 187, and *Murray* v. *Bateman*, 1 *Ridg.* P. C. 187.

Sweet *v.* Anderson, the first case on this tenure.

The earliest reported case on this subject is that of *Sweet* v. *Anderson*, which is as follows:—

4th March, 1722.

Viner, v. 5, p. 93, ca. 15, v. 15, p. 458, ca. 6, v. 19, p. 514, ca. 37, 2. Eq. ca. ab. 211, ca. 5.

Stephen Sweet, Esq. Appellant.
Alexander Anderson, Esq. Respondant.

James Duke of Ormond being tenant for life *inter alia*, of the lands of Kilcross, in the county of Kilkenny, in Ireland, did in the eighth and ninth year of the reign of King William III., obtain an act of parliament in England, to enable him to raise fines, by making leases for lives, renewable for ever, of the same and other lands, in the act comprised for payment of his debts; whereby it was enacted, that it should be lawful for the said James Duke of Ormond, during his life, by himself, or by any two or more persons, by him for that purpose to be commissioned, deputed or appointed to make such leases.

Equity will not relieve against the breach of a condition *precedent*, where the damages accrued are contingent, and cannot be estimated; but it is the proper business of courts of equity to relieve against accident.

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"In pursuance of this act, Sir R. Cox, Kn. Wm. Worth, Wm. Robinson and Ed. Cocker, Esqrs. commissioners appointed by the Duke for the purposes therein mentioned; by indenture, dated the 19th July, 1697, in consequence of £111 in hand, paid as fine, and of the yearly rent of £16. 13. 4, and duties, demised the said lands of Kilcross, with their appurtenances, to Arthur Anderson, clerk, for and during the natural life and lives of himself and of John Anderson his nephew, and Valentine Bolger, and the survivor and survivors of them, under the said yearly rent of £16. 13. 4, and a fat beef, as accates, and £5 for an heriot: and by this lease, the Duke covenanted for himself, his heirs and assigns, to and with the said Arthur Anderson, his heirs, executors, administrators and assigns, that, as often as any of the lives, for which the said premises were thereby granted, or any of the lives which should be inserted in any other lease, then after to be made of the said premises, to the said Arthur Anderson, his heirs and assigns, should happen to fail, he the said James Duke of Ormond, his heirs and assigns, should and would, from time to time, and at all times for ever then after, at the request of the said Arthur Anderson, his heirs or assigns, and upon payment of all the rents of the said premises, that should be then in arrear, and advancing and paying, by way of fine, within twelve calendar months next after the death of each life £16. 13. 4, renew and make a new lease of the said several lands, tenements and hereditaments, to the said Arthur Anderson, his heirs and assigns, at and under the yearly rent and reservations, and with the cove-

nants, conditions and provisoes contained in the said lease; with the like clause for being dispunishable for waste, and the like covenant for renewal for such two lives, as should be then in being, and also for one other life, to be added in the place and room of such of the three lives as should, from time to time, happen to fail.

Provided, that if when such new lease or renewal was to be made, more than one of the *cestui que vies*, before mentioned, should be dead, there should be named in such new lease, so many other lives in their stead; and there should be paid to the person or persons, who was or were to renew the same, a fine of the value aforesaid, for each of the said *cestui que vies*, who should be dead at the time of the said renewal.

At the time of taking this lease, Arthur Anderson had two nephews, each named John Anderson; one being the son of his brother Alexander, who left Ireland in 1697, and the other the son of his brother James, admitted to be still living; but the applicant being then, and for a considerable time afterwards, concerned as agent for the Duke, under the said commissioners, it became his proper office and duty, to take care that all the *cestui que vies* which should be named in such leases as were then to be perfected, should be certainly and rightly described; and, for that purpose, this lease was deposited in his hands to be examined; yet he left in uncertainty, which of the two nephews was the *cestui qui vie*, included in the lease.

By another act of parliament, passed in England in the 12th and 13th years of William III. the said Duke was impowered to sell the fee simple and inheritance of part of the lands, whereof he was enabled to make leases for lives, with renewals as aforesaid; and by virtue of this second act, the Duke, by deeds of lease and release, dated the 2nd and 3rd of March, 1703, did in consideration of £510. 19. 2, grant, bargain and sell to the appellant and his heirs, the said lands of Killcross, subject to the lease so made to the said Arthur Anderson.

In July, 1714, Arthur Anderson died, having made his will, dated the 1st July, 1704, and thereby devised his interest in the said lease to the respondent.

Within twelve calendar months after the death of the said Arthur Anderson, the respondent applied to the appellant for a renewal of the lease, and that another life might be inserted in the room of Arthur; and at the same time tendered the fine of £16. 13. 4, all rents and arrears

being discharged; but the appellant absolutely refused to renew the said lease, insisting, that John Anderson, one of the *cestui que vies* therein named had been absent from Ireland ever since 1697, and therefore must be presumed to be dead; and that no tender of a fine for renewal having been made, within twelve calendar months after his absence, the respondent's benefit of renewal was therefore forfeited.

Whereupon, in Michaelmas term, 1715, the respondent filed his bill in the court of Exchequer in Ireland, against the appellant, setting forth the aforesaid lease, and the covenants for renewal therein contained; and that the respondent was become entitled thereto, and to the benefit of renewing the same; and insisted that John Anderson, the *cestui que vie* in the said lease, was John Anderson the son of James, who was still living; and therefore prayed, that the appellant might be obliged to renew the said lease, by inserting a new life in the room of the said Arthur Anderson, pursuant to the aforesaid covenant.

The appellant put in his answer to this bill, and thereby insisted, that John Anderson the *cestui que vie* in the said lease, had withdrawn himself from Ireland, soon after the execution thereof, and had died in remote parts; and that neither the said Arthur Anderson, or the respondent, having made any tender of a fine for a renewal, within twelve calendar months from the time of his so absenting himself, the benefit of the renewal was become forfeited, and therefore he absolutely refused to renew the said lease.

On the 19th of February, 1717, the cause was heard; when the court directed an issue to be tried at the then next assizes to be held in Kilkenny, whether John Anderson, the *cestui que vie* in the lease mentioned, was living at the time of the plaintiff's tender of his fine to the appellant, or not; and if dead, when he died.

The issue was accordingly tried before Sir John St. Leger, one of the Barons of the said Court of Exchequer, at the assizes held in and for the County of Kilkenny on the 2nd of April, 1718; when the Jury, on the evidence of one Thomas Barnes, who was clerk to the appellant, returned their verdict in the following words, viz. "We find that Black John Anderson, son of Alexander Anderson, is the *cestui que vie* in the lease mentioned; but we do not find that he is dead."

On the 7th of July, 1718, the cause was heard before the Lord chief Baron Gilbert, and the rest of the Barons,

upon the equity reserved; and it then appearing, that John Anderson, the *cestui que vie* found by the verdict, had been a long time absent from Ireland, and there being no positive proof of his being alive, the Court ordered the respondent to amend his bill, by inserting a tender of the fine for the second life, and pay the costs of the day; and that the cause should stand over.

The respondent accordingly tendered the appellant all arrears, and three several sums of £16. 13. 4, for fines, (the said John Anderson having been absent 21 years) which was a fine for each seventh year, and interest for each sum respectively, from every seventh year of the said John Anderson's absence; and then amended his bill, by stating this tender, which the appellant by his answer admitted.—The cause came on again to be heard, on the 2nd of Dec. 1720, when the court was pleased to order and decree the appellant to renew, and make a new lease to the respondent, of the lands in the pleadings mentioned, for the lives named in the bill, and according to the covenant in the aforesaid lease; on the respondent's paying the appellant £16 13. 4. with interest, from the 19th of July, 1704; another sum of £16. 13. 4, and interest from the 19th of July, 1711; another sum of £16. 13. 4, and interest from the 16th July, 1718; and on the respondent's also paying to the appellant, the sum of £16. 13. 4, being the fine due on the death of Arthur Anderson, and all rents in arrear, accates and duties, and an heriot of £5, pursuant to the aforesaid lease.

On the appellant's petition, the cause was reheard upon the 24th May, 1721, when the court affirmed the former decree, and referred it to the officer, to state the account and complete the interest.

From this decree, and the affirmance thereof, the present appeal was brought; and on behalf of the appellant it was argued, that Arthur Anderson, his heirs or assigns, had no right by the covenants in his lease, to have the same renewed, but upon certain terms; which were the demanding such renewal, and paying the fine for it, within twelve calendar months, next after the death of each life, at such place and in such manner, as by the covenant was directed. That it was admitted by the respondent's bill, that he had not complied with these terms; for that one of the lives was dead in July 1704, which was fourteen years before he tendered any fine or demanded any renewal for that life; and there was no proof in the cause that the said John Anderson was living, at any time since the year 1697.

R. Reymond.
P. Yorke.

Besides, the allowance of interest by the decree, since the 19th July, 1704, was an admission that the tender of the fine was not made within twelve calendar months; for if it had, there could have been no pretence to decree interest. That the terms on which the respondent was to be entitled to a renewal, were in the nature of a *condition precedent*; and it is the general rule in Courts of Equity, not to relieve against the non-performance of such conditions. That it was not possible to know what damage might occur to the lessor, by the lessee's not tendering his fine, and having a renewal within the time limited; the same depending upon the fall of lives, which was merely contingent, and incapable of any certain valuation. That upon the respondent's neglecting to renew according to the covenant, an absolute right to reversion of the lands expectant on the determination of the remaining lives, passed over to, and vested in the appellant, by the authority of the act of parliament, discharged of the covenant of renewal: and for a Court of Equity to give relief against the express provision of an act of parliament, was the same thing, in effect, as to repeal it. That the appellant was a purchaser not only of the fines for renewal of the lease, but also of the benefit of the forfeiture for such renewal, by the neglect to renew according to the tenor of the covenant; and that too, under an act of parliament: and therefore it was conceived, that a Court of Equity ought not to dispense with, or relieve against such a forfeiture, and thereby deprive the appellant of the very thing which he had purchased.

T. Lutwyche. C. Talbot.

On the other side it was contended, that it did not appear in the cause, that John Anderson, the *cestui que vie*, was yet dead; for the jury did not by their verdict, find him to be dead, and therefore the presumption was, that he was still living. That there did not appear to be any wilful default in the respondent, or in his testator, whereby he should incur a forfeiture; but it plainly appeared, that the appellant was a manager for the Duke of Ormond, at the time of making the lease. And therefore, if there was a default, it was in him, who intended to insist on that advantage; otherwise he would have applied to the respondent's testator to renew his lease, which he might and ought to have done. As to the respondent's admitting the *cestui que vie* to be dead, that was only in obedience to the order of the court, who were minded to make an adequate amends to the appellant, upon a presumption, from the long absence of the *cestui que vie*, that he was dead; and

the appellant ought rather to be pleased with this decree, which was so much to his advantage; when the covenant for renewal within twelve calendar months after the death of each life, must be construed to extend only, where the *cestui que vie* was fully proved to be dead. That the appellant knew the *cestui qui vie* was out of the kingdom, and if he thought there was any ground for it, he might have obliged the respondent's testator to have renewed: it was merely accidental that the *cestui que vie* went out of the kingdom, and it is the proper business of a Court of Equity to relieve against accidents; therefore, the recompense which the Court made, by allowing a life to be dropped at the end of every seventh year, and to pay a fine and interest for the same, was a very ample satisfaction; considering, that an annuity for life could not be bought at less than ten years purchase. That the words of the act of parliament were *in cases of neglect and refusal*, which necessarily implied *wilful* neglect and refusal; but which, for the reasons before stated, neither the respondent nor his testator could be guilty of. That as the respondent had complied with the order of the court, by tendering so many fines, he had given manifest evidence of his willingness to renew; and therefore apprehended, that he had a continuing interest in the lands, there being no negative words in the lease whereby it could appear, that the benefit of renewal was to be forfeited, if new lives were not named within twelve months. That it was the proper business of a Court of Equity, to see that the true intent and meaning of the act of parliament, and the covenants in the lease were observed and performed acording to equity; and as it appeared by the appellant's own shewing, that he was a common purchaser in fee of the said lands under the said act, he could not thereby be in a better condition than the Duke of Ormond would have been in, had he remained owner of the estate: nor did the appellant's case thereby differ from common cases; but the respondent's case was very different from what it would have been, if it had been clearly proved that the *cestui que vie* was dead: however, as the respondent was only relieved against an unavoidable accident, it was humbly insisted, that the decree was agreeable to equity and justice, and ought therefore to be affirmed.

Accordingly, after hearing council on this appeal, it was *ordered* and *adjudged*, that the same should be dismissed; and the decree and order therein complained of, affirmed.— 2 *Bro. Ca. in Par.* 430.

Decree affirmed *Jour.* vol. 22, p. 105.

Observations on the foregoing Case.

Observations on the case of Sweet v. Anderson.

THIS case is in the first instance remarkable for being the first or oldest in the series of cases which comprises almost the entire law on the subject of this tenure in Ireland; that series, as collected by the Editor, and set forth in this treatise, commences with *Sweet* v. *Anderson*, and concludes with *Fitzsimon* v. *Burton*. This series, together with the Tenantry Act, 19 and 20 Geo. 3. c. 3, and a few correlative enactments, constitute the entire law on this subject: these cases are nearly all equity cases; and this subject belongs almost entirely to our Courts of Equity.

This case is in the next place remarkable for the establishment of septennial fines. It originated in the Exchequer of Ireland, Michaelmas Term, 1715, on a bill filed by the respondent praying a renewal; Sir Jeffrey Gilbert at that time filled the office of Chief Baron in Ireland.* Before this case, the introduction of this tenure had been long and extensively prevalent in Ireland; not limited as to its commencement, as some would limit it, to the period of the Revolution;† but with more reason, according to the view of

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**A List of the Lord Chief Barons of the Exchequer, from* 1714 *to the present Time.*

1714 Rt. Hon. Joseph Deane, vice Rochfort.
1715 Rt. Hon. Jeffrey Gilbert.
1722 Rt. Hon. Barnard Hale, vice Gilbert, made a Judge in England.
1725 Rt. Hon. Thomas Dalton.
1732 Rt. Hon. Thomas Marlay.
1741 Rt. Hon. John Bowes, vice Marlay, made Ld. Ch. Justice of the King's Bench.
1757 Rt. Hon. Edward Willes, vice Bowes, made Lord Chancellor.
1766 Rt. Hon. Anthony Foster, vice Willes, made Sol. Gen. in England.
1777 Rt. Hon. James Dennis, afterwards Lord Tracton.
1782 Rt. Hon. Walter Hussey Burgh.
1784 Rt. Hon. Barry Yelverton, afterwards Lord Yelverton.
1805 Rt. Hon. Standish O'Grady.

† In the case of *Bateman* v. *Murray*, 1 *Ridg*. P. C. 191, Kelly, Mc Mollen, Davis, Boyd, and Crookshank, for the Plaintiffs. *Arguendo*. "Leases of this kind have been considered as perpetual interests, and are sold and conveyed as such: they were introduced about the time of the Revolution, to procure responsible tenants by giving them permanent interests, which have since been considered as inheritances."

Mr. Ridgeway, originating about the period of 1643; and not limited in its extent by the domestic policy of any single great land-holder, as for instance, James Duke of Ormond; but more probably deriving its extension from a similar policy in all other great land-holders, especially the absentee proprietors of Ireland, who must have been influenced by the same motives as the Duke of Ormond to adopt the arrangements of a tenure which in a country so poor, was so well adapted to create and encourage a respectable and improving tenantry. To such causes of extension may also be added those additional ones assigned by Mr Ridgeway; namely, that these leases were also adapted to cover the property, or a part of the property, of the Roman Catholics amidst the various convulsions of property to which this country was from many causes subject; and which enabled the Roman Catholic to transfer the fee by the procurement of a patent or otherwise to some friendly Protestant, and thus become the tenant at a small rent and nominal fine, to his Protestant friend for his former estate, under a tenure which promised to secure to him and his family the chief usufruct of it. This view of course applies to a period antecedent to the rigours of the penal code; but the Editor is referring to the source of this tenure, which he apprehends was earlier than the enactment of the rigorous part of the penal code in Ireland.

The Editor submits that these different circumstances, or most of them, combined to establish this tenure in Ireland, and began to operate not so recently as the Revolution, but long before. The original lease in the case of *Boyle* v. *Lysaght* negatives the possibility that the commencement of this tenure could be confined to the time of William the Third, or the period of the Revolution; because that lease bears date so early as 1660.*

Landed property in Ireland being thus circumstanced, these leases were considered as perpetuities; and marriage

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* The Editor apprehends, that for the reasons collected above; and more particularly for the strong reasons suggested by that most learned and neglected Barrister Mr. Ridgeway, it is a mistake to suppose that this important Irish tenure was or could be so recent in respect to its introduction as the period of the Revolution; and it is important that a tenure which has been so long considered by our highest judicial authorities in Ireland, as the common law, or a general custom of Ireland, should not have a period so recent assigned as the period of its commencement, without strong cause.

settlements, mortgages, and other securities grounded upon them as perpetuities. To adopt the expression of Lord Lifford, "if a man had one of these leases, there would have been no more doubt of lending him money, than if he had the fee."

Yet this perpetuity, so important to this estate and its incumbrancers, in its original formation, and the terms of the tenure; hung upon a condition, which however easy to be performed, was often, in a distracted country, and by a people characteristically improvident, neglected, and usually neglected. The first fine on the perfection of the lease was generally a sum of some importance; but the prospective fines, on the future drops of the lives, were so unimportant, or nearly nominal, that the demand of them was seldom attentively required; and the payment thereof still more generally neglected. Yet there was in the original lease the recorded promise of an interest for ever; and the Courts of Equity in Ireland felt themselves bound in a peculiar manner where important improvements had been made on these lands, far beyond the possible anticipation of the lessor at the time of granting the lease, and where the rapid improvement of the Country had made these improvements still greater, and more disproportionate in value, beyond that which the original lessor could by any possibility have anticipated or foreseen; and where family settlements had been made, and incumbrances incurred, on the faith that these leases were in their nature perpetual; and not likely or liable to be forfeited back to the representative of a remote lessor, by some neglect, however protracted, in the lessee, or some representative of the lessee: the Courts of Equity in Ireland felt it their duty, and made it their practice to enforce the renewal; that is, to enforce the performance of the original promise on the landlord; namely, that he should continue to make the lease perpetual, so far as in him lay, provided that the tenant could make compensation for such neglects as he, or those whom he represented, had suffered to arise.

England knew nothing of this state of things; her happier situation had never made it necessary that the inheritor should part in particular instances with the great body of his interest to his tenant, reserving to himself little more than the allodial character of the nominal lord of the fee, in order that he might introduce a growth of prosperity, and a quantity of tranquillity, into an impoverished, distracted, and extended estate. The great Irish landholder

interspersed these tenures, as insulated portions of agricultural example, amidst an extended tenantry; whom he was anxious to control by the neighbourhood, or improve by the example of a superior tenantry so favourably circumstanced. England knew nothing of this state of things which were, from the circumstances of Ireland, thus forced on the consideration and protection of the high courts of Equity in this country: it was all matter of equity, and the misfortunes of Ireland, and the struggles to extricate herself from them, put forth this peculiar claim to the protection of her Equity courts, which they, from an early period, felt themselves constrained to adopt and regulate.

The law of England unfavourable to a perpetual lease, in Ireland not so.

Lord Lifford says, that with the notions which he brought from England to Ireland, this tenure was entirely unknown to him, and naturally so, as the Editor repeats, because this state of things was entirely unknown to England; and the laws of England in its justice, or perhaps in its favour to the inheritor, leaned against the idea of a perpetual lease. But Lord Lifford, when become Lord Chancellor of Ireland, and being more informed on the nature and tenures of the property of this country, and the course of her accustomed jurisprudence, and the opinions of the best informed amongst her most experienced barristers and judicial men, found good reason, and felt it his duty to adopt, what he called, the old equity of Ireland: he found that another great equity judge, transferred like himself from England to this country, had before him, felt it his duty to act on the principles of this peculiar code, and to devise extra means of effectuating its objects. He found that Lord Chief Baron Gilbert, so early as the year 1717, in the case of *Sweet* v. *Anderson*, had devised, what seemed to him a reasonable means of constructing a compensation for the neglect of the tenant in the non-payment of the fines become due on the drops of the lives in the lease. This arrangement may be found in the case of *Sweet* v. *Anderson;* it is a compensation by way of septennial fines, on the principle of the statute, which enacts, that "a man, if not heard of for seven years, shall be presumed to be dead:" in that case, the man, whose life was in question, had been absent from Ireland for twenty-one years. The first of these seven years had terminated on the 19th July, 1704; the fine was £16 13*s.* 4*d.*, and the decree was, that that fine, with interest thereon, should be paid by the tenant from the date thereof; and also another fine to the same amount, and interest thereon, from the

Original scale for septennial and renewal fines.

19th July, 1711; and also a third fine with interest thereon, from the 19th July, 1718. To which was added a fine on the positive and acknowledged death of another life; and a further order, that all rents and duties in arrear should be paid up.

On the payment of all these he directed a renewal; thus establishing the principle of compensation for the neglect of the tenant, in the manner of these septennial fines, whereby he conceived, that a court of Equity in Ireland would be authorized to consider that the tenant had squared his accounts with the landlord in cases resulting from mere neglect; and would then be authorized to require from the landlord a performance on his part of the original agreement of the landlord, to give to the lease, so far as he was concerned, the character and effect of a freehold for ever.

This decree of Chief Baron Gilbert, in the case of *Sweet* v. *Anderson*, was affirmed on appeal to the House of Lords in England. The following is the opinion of Lord Redesdale on his view of this case, in which he differs, and the Editor humbly apprehends, differs on just grounds, with the view imputed to Lord Mansfield respecting such cases. The following is the opinion of Lord Redesdale on this case:—

Opinion of Lord Redesdale on the case of Sweet *v.* Anderson;

"The reasons offered in the case, *Sweet* v. *Anderson*, on appeal in support of the decision, show clearly what was then understood to be the rule of the courts in Ireland on the subject; namely, to give relief against accident, but not against wilful neglect or refusal. In that case the court must have supposed the contract complied with, as it was equally unknown to both parties, whether the life had dropt or not. It is clear therefore the court and the House of Lords did not, in that case, consider themselves as bound by that necessity of strict performance of the covenant on the tenant's part, which Lord Mansfield is supposed to have considered as binding in such cases."—2 *Scho. and Lef.* 682.

Of Lord Mansfield.

"The case of *Sweet* v. *Anderson*, which came before the House of Lords in 1722, was a case under peculiar circumstances; it was not known whether the *cestui que vie* had been dead or not."—*Lord Mansfield*, *in Kane* v. *Hamilton.*

The Editor may here observe, that the words here imputed to Lord Mansfield, can only be correct by referring them exclusively to the particular *cestui qui vie* whose life was in question, namely, John Anderson. It is certain

that the life of one *cestui que vie*, Arthur Anderson, had dropped; in respect to which the fine had been tendered within time; and it is also certain that the other *cestui que vie* John, had been absent from Ireland 21 years; so that all the probabilities were, that two lives had dropped out of the three.

Of Lord Pery;

"But as the landlord suffered an injury by the tenant's neglect to renew in time, it was necessary to make him compensation. The only difficulty was in settling what that compensation should be. The septennial fines, established by Lord Chief Baron Gilbert, were more than adequate; for at that time the price of an annuity for life was ten years' purchase. The decree in that case was affirmed by the Lords of England, and by numerous determinations afterwards that rule was established as the law of *this land*."—*Lord Pery, in Boyle* v. *Lysaght*.

Of Lord Earlsfort;

"From the determination of that great man, Lord Chief Baron Gilbert, in the case of *Sweet* v. *Anderson*, down to the reversal of the decree in *Murray* v. *Bateman*, persons having such leases were considered to have perpetual interests, and not depending on the strict terms of the renewal clauses."—*Lord Earlsfort, ib.*

Of Lord Lifford.

"Lord Chief Baron Gilbert only invented the mode of making satisfaction for lapse of time by the rule he adopted respecting septennial fines."—*Lord Lifford, in Bateman* v. *Murray*.

The second case on this subject is:—

17th March, 1740.

Richard Earl of Ross, in Ireland, Appellant.
Elizabeth Worsop, otherwise *Wood*, widow; *Worsop Bushe*, and *Noah Webb, Esquires*, Respondents.

Where a lessor covenants for the perpetual renewal of a lease, upon the lessee's naming a new life, and paying a fine within a certain time after the death of any of the cestui que vies, a court of Equity will, upon slight circumstances, relieve the lessee against a forfeiture, for not literally com-

Sir Thomas Worsop, Knt., having married Elizabeth, the aunt of Richard Lord Viscount Ross, the appellant's father, got possession of the manor, town and lands of Dunshaghlin and Rosetown, with the appurtenances, in the county of Meath, in Ireland, towards payment of the said Elizabeth's portion; and after the same was paid off, still continued to enjoy the premises, by agreement with the mother and guardians of the Viscount, during his minority.

Soon after the Viscount came of age, Sir Thomas, upon a pretence that he had laid out £1000, in buildings

plying with the terms of the covenant.

and other improvements on the premises, prevailed on the Viscount to grant him a lease thereof for three lives renewable for ever: and accordingly, by indentures of lease and release, dated 26th and 27th May, 1682, the Viscount, in consideration of love and affection to his aunt, and of £1000 recited to have been laid out in improvements on the premises, pursuant to former agreements, and of £57 10*s.* then paid as a fine, granted and conveyed the said premises to Sir T. Worsop and his heirs, during the natural lives of John Worsop and Thomas Worsop, first and second sons of Sir Thomas, and of Elizabeth Worsop, his fourth daughter, at the yearly reserved rent of £200, payable half-yearly.

By this deed, the Viscount covenanted, that he, his heirs and assigns, in failure of any of the said lives, or those thereafter to be added, and of payment of £100, as a fine, and nominating a life to be added in the place of such life so falling, within six months after such failure, and paying the arrear of rent then due, would from time to time, for ever renew the lease to the said Sir Thomas Worsop, and his heirs. And Sir Thomas thereby covenanted for himself and his heirs, with Lord Ross, that he and they, on failure of every of the lives named in the said lease, or to be added, should, on nominating a new life as aforesaid, to be inserted in the place of every life so falling, pay to Lord Ross, at the Tholsel of the city of Dublin, the sum of £100 over and above the annual rent, within six months after the failure of every such life.

But it was expressly provided, that if it should happen, that upon the failure of any of the lives therein nominated, or to be nominated as aforesaid, the said Sir T. Worsop, his heirs, executors, administrators, or assigns, should not pay the said Richard Lord Viscount Ross, his heirs or assigns, for every life so failing as aforesaid, the said full and entire sum of £100, at the Tholsel as aforesaid, within six months after the failure of such life; and should not also within six months nominate the life of some other person in lieu thereof, to be added to the time and term of the said grant; then and for ever after such failure, on the part of the said Sir T. Worsop, his heirs or assigns, it should and might be lawful to and for the said Lord Viscount Ross, his heirs, executors, administrators and assigns, to sue for the said £100, or else at his election, for ever after to deny and refuse the making of such renewal, by adding any other life or lives to the time and term of the said grant: and that in

case thesaid Sir T. Worsop, his heirs and assigns should not, within the time aforesaid, pay the said sum of £100 for each life so to be added, and nominate such life within the time aforesaid; then the said premises, from and after the determination of the lives then in being, should be and remain to the use of the said Lord Viscount Ross, his heirs and assigns.

On the 27th May, 1686, Thomas Worsop, one of the three lives, died; and by indenture dated 26th Nov. 1686, between the Lord Ross and Sir T. Worsop, Anne Worsop, his youngest daughter, was named in the stead of the said Thomas Worsop, who died without issue.

About Jan. 1688, Sir T. Worsop died; and on the 2nd Jan. 1689, John Worsop, his son and heir, and one other of the lives in the release named, died without issue; and by indenture, dated 10th Feb. 1690, between the Lord Viscount Ross of the one part, and Dame Elizabeth Worsop, widow and relict of Sir T. Worsop, Lettice Worsop, Thomas Toller, Esq. and Dorothy his wife, and Elizabeth and Anne Worsop, (which Lettice, Dorothy, Elizabeth, and Anne, were four of the daughters of Sir Thomas, and the said Elizabeth and Anne were two of the lives then in being) of the other part; Elizabeth Hoey was named in the stead of the said John Worsop deceased.

Dame Elizabeth Worsop died about Oct. 1695, and Lettice Worsop also died without issue; whereby the interest in the premises under the said indentures of lease and release, became vested in Elizabeth, Dorothy, and Anne Worsop, as sisters and co-heirs of the said John Worsop, the son and heir of Sir T. Worsop.

Elizabeth Worsop intermarried with John Wood, the younger, Esq., and Dorothy intermarried with Thomas Toller, who in 1695, sold their interest in the premises to Dean Noah Webb; and Anne intermarried with Arthur Bush, and died on the 23rd Nov. 1693, leaving issue one son, the respondent, Worsop Bush. The said Dean Noah Webb also died, having first made his will, and thereby devised his interest in the premises to his wife Deborah during her life, and after her decease to his son Henry Webb and his heirs.

After the death of Anne Bush, one of the *cestui que vies*, application was made by Arthur Bush her husband, to Lord Ross, who was then in London, to renew the lease, which he promised to do upon his return to Ireland; and

that no advantage should be taken of any lapse in the mean time.

Soon after this conversation, one Fitzgerald, Lord Ross's agent, wrote a letter to Mr. Bush, informing him that he had orders from his Lordship to receive the rent in arrear, and also the fine for renewal; but as Lord Ross was indebted to one Darby, he desired that Bush would accept bills drawn upon him, payable to Darby. Accordingly in Feb. 1694, two bills were presented to Bush, one for £52. 10. and the other for £47. 10. making together £100, which he accepted; and one of these bills was mentioned to be for the rent of the lands, and the other in part of the fine: but neither of them was ever tendered to Mr. Bush for payment.

In 1695, Lord Ross returned to Ireland, when he was applied to for a renewal, and a deed was tendered to him for that purpose, together with £100 as the fine; but his lordship would not at that time, either execute the deed, or receive the fine: whereupon Mr. Bush wrote a letter to Lord Ross upon the subject, and receiving no answer, he in 1697, applied to his lordship personally, and having made him sensible of the injustice of his refusal, he obtained a second promise from him that he would renew; and the notary public whom his lordship employed, and who had prepared the deed which had been tendered to him, was then sent for; but not happening to be in town, Lord Ross expressed some concern, and assured Bush that he would execute the deed whenever the notary returned.

But notwithstanding all this, Lord Ross refused to renew, and insisted upon the lapse of time which had happened while he was in England; and therefore in Trinity term, 1701, John Wood, (whose life had been named in the room of Ann Bush,) and Elizabeth his wife, Worsop Bush, son and heir of the said Ann, Deborah Webb, widow and relict of Dean Noah Webb, and Henry Webb, son of the said Noah and Deborah, exhibited their bill in the court of Exchequer in Ireland, against the Lord Viscount Ross; stating the several applications and promises for a renewal, and praying that Lord Ross might be compelled to receive the £100, and execute an instrument of renewal for the life of John Wood, in the room of the said Ann Bush, deceased.

To this bill Lord Ross, on the 18th June, 1702, put in his answer and plea. By his answer he admitted that he was in England at the death of Ann Bush in November,

1693, and did not return to Ireland till the summer of 1695; but insisted on the plaintiff's having neglected to name a new life, and pay the fine within the six months limited by the release; and that as the fine was to be paid at the Tholsel in Dublin, the plaintiff might have tendered it there, and needed not to follow him to England to make him a personal tender of it. He denied the several promises of renewal charged by the bill. And as to the specific relief thereby prayed, Lord Ross pleaded, that in the release to Sir T. Worsop, over and above the covenants and agreements in the bill set forth, there was another covenant in the following words, viz.:—"And the said Sir T. Worsop, for himself, his executors, administrators and assigns, doth hereby covenant, grant, and agree, to and with the said Richard Lord Viscount Ross, his heirs, executors, administrators and assigns; that he the said Sir T. Worsop, his heirs, executors, administrators and assigns, or some of them, shall and will, from time to time, and at all times hereafter, upon the failure of every life of every several person or persons within the term of this lease nominated, or to be nominated as aforesaid, for every life so failing, satisfy and pay the said Richard Lord Viscount Ross, his heirs, executors, administrators and assigns, the full and entire sum of £100 sterling, at the Tholsel in the city of Dublin, over and above the annual rent hereby reserved, within six months after the failure of every such life; and every such payment of such sum of £100, to be made without any deduction or defalcation, for or by reason of assessments, subsidies, or any other charges whatsover, chargeable on landlord or tenant, as aforesaid. Provided always, that if it shall happen, that upon the failure of every such life herein above terminated, or to be nominated as aforesaid, the said Sir T. Worsop, his heirs, executors, administrators and assigns, shall not pay the said Richard, Lord Viscount Ross, his heirs or assigns, for every life so failing as aforesaid, the said full and entire sum of £100, at the Tholsel as aforesaid, within six months after the failure of such life, and shall not also within the said six months, nominate the life of some other person in lieu thereof, to be added to the time and term of this present grant as aforesaid; that then and for ever after such failure on the part of the said Sir T. Worsop, his heirs, or assigns, it shall and may be lawful to and for the said Richard Lord Viscount Ross, his heirs, executors, administrators and assigns, to sue for the said sum of

A negative clause.

£100, or else at his election, for ever after to deny or refuse the said Sir T. Worsop, his heirs, executors, administrators and assigns, to add, nominate, or put any other life or lives, to the time and term of this present grant, other than the life or lives which then shall be in being: and in case the said Sir T. Worsop, his heirs and assigns, shall not, within the term or time hereby limited and agreed, pay the said sum of £100 for each life so to be nominated, and nominate each life so to be added within the time aforesaid; that then the premises from and after the determination of the lives then in being, shall be and remain to the use of the said Lord Viscount Ross, his heirs and assigns." He further pleaded, that the said Sir T. Worsop dying before the said Ann, the heirs, executors, administrators or assigns of the said Sir T. Worsop, did not, within six months after the death of the said Ann, pay or tender to the said Viscount, or his assigns, the said fine of £100, over and above the annual rent, at the Tholsel, in Dublin, or elsewhere; nor within the said six months, nor in some years after, nominate a new life whereby the said Lord Viscount was at liberty, for ever after, to refuse to add any other life; and the said premises, after the determination of the lives then in being, were by the said indenture, limited to remain to the said lord Viscount, his heirs and assigns for ever. And that after failure made of the said money, or nominating any new life, he made his election, as he then did, and declared that he would not renew the said lease.

This plea was argued on the 24th November, 1702, when it was ordered that the plea should be reserved with the costs, till the hearing of the cause, with liberty for the plaintiffs to reply.

Soon afterwards Lord Ross died, leaving the appellant his eldest son and heir, a minor; who thereupon became seised in tail of the reversion of the premises, subject to the said lease for lives, during the continuance of the lives then in being, by virtue of a settlement made by his father in 1692, and not as his heir at law.

The respondent took no step in the cause, from the time of arguing the plea in 1702, till Hilary 1718, when they exhibited their bill of revivor against the appellant, but did not proceed thereon; and on the 27th May, 1725, amended their said bill, and made Francis Bernard, Theobald Butler and John Butler (to whom the appellant has conveyed the premises upon several trusts, in pur-

suance of an act of parliament) defendants; to which bill the appellant, on the 3d February, 1726, put in his answer, and thereby insisted, that the respondents had lapsed their time for a renewal, and hoped he should not be compelled to add a new life instead of a former, which by the bill appeared to have fallen thirty-three years before.

On the 7th January, 1729, Elizabeth Hoey, who had married one Roth, and was the life added in the room of John Worsop, died, afterwards Deborah Webb died, and also Henry Webb, leaving Noah Webb his eldest son and heir; and on the 1st April, 1730, John Wood, the life named by the respondents in their bill to be added in the room of Ann Bush, likewise died: whereupon the respondents, on the 31st March, 1731, exhibited another bill of revivor, and also a supplemental bill against the appellant, and the said Francis Bernard and John Butler, the said Theobald Butler being then dead, in order to compel the appellant to add the life of Richard Toller, for that purpose named in this last bill, in the room of the said John Wood, and to receive the fine of £100 for such reversal. But the respondents, in this bill, took no notice of the death of Elizabeth Hoey, who died in January, 1729, nor sought to have any new life inserted in her place, though they had notice thereof.

To this bill the appellant put in his answer, and thereby insisted on the benefit of his father's plea, and that he was not now obliged to renew, the respondents having lapsed their time.

The cause being at issue, the respondents examined several witnesses therein. And on the 27th June, 1758, they exhibited another bill against the appellant, setting forth the several matters aforesaid, and that they had named Worsop Bush, as a new life in the room of the said Elizabeth Hoey, and had caused a tender to be made to the appellant of £100, for adding the life of the said Worsop Bush in the premises, in the room of the said Elizabeth Hoey, deceased; and prayed, that the appellant might be compelled to receive the said £100 and add the life of the said Worsop Bush in the premises. To which bill, the appellant put in his answer, and inserted on the plea and answer put in by his father to the former bill, and on the several matters set forth in the appellant's former answers, and the long acquiescence of the respondent, without any suit for renewal, in the bar of all the relief prayed by them.

This cause being likewise at issue, the respondent examined several witnesses, and both the causes coming on to be heard together on the 2nd of July, 1740, the court overruled the plea put in by the appellant's father, and decreed that the respondent should bring into court the sum of £100, being the fine due to the appellant's father for renewing the lease of the lands of Dunshaghlin and Rosetown, on the death of Anne Worsop, otherwise Bush, who died on the 3rd Nov. 1693, with legal interest for the said £100, to be computed from the end of six months next after the death of the said Anne Worsop, otherwise Bush, for the use of such of the representatives of the appellant's father, as should be entitled thereto; and that the respondents should also pay the appellant a further sum of £100, being the fine due for renewing the same lease, on the death of Elizabeth Hoey, otherwise Roth, who died on the 8th Jan. 1729, with interest to be computed from the end of six months next after the death of the said Elizabeth Hoey, otherwise Roth; and that the respondents should likewise pay to the appellant a further sum of £100, being the fine due for renewing the said lease on the death of John Wood, Esq., who died on the 1st April, 1730, with interest to be computed from the end of six months after the death of the said J. Wood; the interest of the said three several sums to be paid and computed at the rate that money bore interest from time to time, by act of parliament in Ireland; and that the respondents should also pay to the appellant all arrears of rent due for the premises. And the court further decreed, that thereupon the appellant should execute a renewal of the original lease of the premises to the respondents, and their heirs, for and during the lives of the said Elizabeth Worsop, otherwise Wood, widow, one of the *cestui que vie*, in the original lease, Worsop Bush, and Richard Toller, Esqs., and the life of the longest liver of them, at and under the yearly rent, and subject to the several claims in the said original lease mentioned and contained.

From this decree Lord Ross appealed; contending, that it was the express agreement of the parties, that if Sir Thomas Worsop, his heirs or assigns, did not, within six months after the death of a *cestui que vie*, pay the £100 fine, and also name a new life, that then the Earl and his heirs were to have their election, either to sue for the £100, or for ever refuse a renewal. That a Court of Equity ought not to dispense with a lapse of time in cases of this nature;

because it was not a matter of form or circumstance, but a substantial and valuable part of the agreement, that the time for renewal should be fixed within a certain period, and that the fine should be paid, and the life named within the time appointed; for to prolong the nomination of a life, is to take away the chance of the death of a *cestui que vie*, if named in time, and the fine attendant thereon, during the suspence of such nomination. Besides it gave the advantage of the contingency from the landlord to the tenant against the express stipulation of the parties; and would encourage tenants to use all delays that invention could suggest, if they were sure of finding relief in a Court of Equity against a lapse of time, to renew the estate. That the proviso was not calculated for a penalty or condition to enforce a performance of any part of the agreement, and upon that ground subject to relief in a Court of Equity, but was intended to be strictly and precisely executed; and the rather, because there was not a stipulation for a renewal: the Earl and his heirs were bound to renew, upon payment of the fine, and naming a new life, within the time for that purpose limited; but Sir Thomas Worsop and his heirs, though liable to the payment of the £100 upon the death of a *cestui que vie*, were not obliged to add any farther life, or accept of a renewal; and if the appellant was not to take a legal advantage of the proviso, he would be without remedy in this respect. That this was not a case which lay in compensation, for the damage which might be sustained by dispensing with a lapse of time, being merely eventual, and depending upon contingencies incapable of being estimated with any certainty, no proper equivalent or compensation could be given in lieu of it. And that the supposed promise or declaration of the late Lord Ross, dispensing with the time limited for the nomination of a new life in the room of Anne Bush, was supported by the evidence of one single witness, father of one of the respondents, and examined to a supposed conversation upon an accidental meeting in the street, about 35 years before the examination; whereas it was expressly denied by Lord Ross's answer, and attended with great improbabilities; and it was apprehended that such parol evidence would be productive of all the mischiefs intended to be avoided by the statutes of frauds and perjuries.

On the other side it was insisted, that the respondents came properly into a Court of Equity for a specific perform- J. Strange. W. Murray.

ance of Lord Ross's covenant to renew, according to the true intent and meaning of the parties; and that many decrees had been made for the specific performance of such covenants, and especially in Ireland, where these perpetual leases are frequent. That upon the death of Anne Bush (the only life upon the failure of which a formal tender and nomination in time was not made) the condition on which the lessees became entitled to have another life added, was substantially and in equity performed, application having been made to Lord Ross for that purpose, within about a month after her death; but the actual renewal was deferred till his return to Ireland, at his own desire, and upon his express promise to take no advantage of the six months expiring in the mean time; for otherwise, the nomination of the life, and the proper instruments would have been procured from Ireland before the six months could have expired; and it would be contrary to justice, to suffer a man to take advantage of his own wrong. That the bills drawn upon Mr. Bush by Lord Ross's agent, and accepted, and his lordship's promises to renew, made to Mr. Bush, in Dublin, in 1697, when the Notary was sent for, were not only a confirmation of the original agreement to renew, notwithstanding the expiration of the six months, but ought to be considered as an election made within the terms of the proviso, rather to take the £100 fine, than to vacate the lease; and amounted to a waiver of any legal advantage arising from the lapse of time, if any such advantage had been gained before. And therefore it was hoped, that the decree would be affirmed, and the appeal dismissed with costs.

Decree affirmed Jour. v. 25. 629.

Accordingly after hearing counsel on this appeal, it was *ordered* and *adjudged* that the same should be dismissed, and the decree therein complained of affirmed, and it was further ordered, that the appellant should pay to the respondents £100 for their costs, in respect of the said appeal. 4 *Bro. Ca. in Par.* 411.

Observations on the Case of Ross v. *Worsop.*

Ross v. Worsop, the first case in which a negative clause occurred: and a renewal notwithstanding affirmed by the Lords in England.

This case, like that of *Sweet* v. *Anderson*, originated in the Exchequer of Ireland on a bill filled for a renewal. A renewal was decreed as in the former case, and confirmed on an appeal to the house of Lords in England. On the hearing of this case Lord Chief Baron Marlay, presided in the Irish Court of Exchequer. This case is a much stronger

one than the preceding in favour of what has been called "the tenant's right." It differs from *Sweet* v. *Anderson* in thecircumstance of containing a negative clause or proviso, notwithstanding which, a renewal was decreed; and that renewal approved of by the Lords in England. This of course is the first reported case in which a negative clause occurred.

A negative clause, what.

A negative clause in a lease renewable for ever in Ireland, is an express proviso, that if the tenant neglect to renew within a certain time, he should not have a right to call upon the landlord for a renewal.

In this case it was contended by the appellant, "that a Court of Equity ought not to dispense with a lapse of time in cases of this nature; because it was not a matter of form or circumstance, but a substantial and valuable part of the agreement, that the time for renewal should be fixed within a certain period, and that the fine should be paid, and the life named within the time appointed."

In a renewal lapse of time not essential to the contract; and therefore equity will relieve against the lapse of time.

The answer to this principle, as applied to these cases, is, that a Court of Equity is in the constant habit of relieving against the lapse of time; and so in the case of mortgages, and in many instances relief is given against mere lapse of time, where lapse of time is not *essential* to the substance of the contract: thus in the case of an estate sold by auction, there is a condition to forfeit the deposit, if the purchase be not completed within a certain time: and in such case, a Court of Equity is in the constant habit of relieving against the lapse of time. Here also, as Lord Redesdale observes, that is, in the case of renewals, "*the time is not essential;* for the mere object of fixing a time is to preserve the tenure, and the remedies for the rent and the fine, where it is more than nominal; and if those are preserved, the substance of the contract is performed, though the letter of the contract may not be preserved."—*Redesdale* in *Lennon* v. *Napper*.

Time is not an essential part of the contract.

Therefore the mistake of the argument for the appellant in the case of *Ross* v. *Worsop*, is, that it assumes that the lapse of time is an essential part, whereas it is only a formal part of the contract for a renewal.

The principle (by the appellant) has been misapplied in the case of *Ross* v. *Worsop;* it is true, that equity will not dispense with the substantial part of the agreement; but it is also true, that the circumstance of *time*, is not a substantial part of the agreement for a renewal.

Septennial fines are compensation for the drops of the lives.

The second argument used by the appellant in this case, was, that "to prolong" the nomination of a life, is to take away the chance of the death of a *cestui que vie*, if named in time; and the fine attendant thereon, during the suspense of such nomination, the answer to which is, that the invention of septennial fines, with interest thereon, was arranged in the former case by Chief Baron Gilbert to meet this very contingency, and compensate for its disadvantages.

Opinion of Lord Redesdale.

"The next case is *Lord Ross* v. *Worsop:* there, as to the life in place of Elizabeth Hoey, the relief was against mere neglect. There had indeed been no change of possession in that case, and one life was in being; and the change of possession is only material as it changes the character of the landlord in respect to the land, when he takes possession as owner. But I do not understand what is said by Lord Lifford, as to there being a legal estate for the equity to attach upon. The equity arises from the contract; the change of possession is a circumstance, as it alters the condition of one of the parties materially; but in any other view I do not understand this expression."—*Lord Redesdale* in *Lennon* v. *Napper*.

The next Case is (1*st May*, 1744,)

Where a lessee wilfully conceals the death of any of the *cestui qui vies*, and acts under such concealment for his own advantage the lessor is not obliged to renew, but may take advantage of the forfeiture and enter upon and hold the estate.

Cordelia Pendred, widow; *Morley Pendred*, her eldest Son, an infant, and *John Hawkshaw*, Appellants.
James Carrol Griffith, *Esq.* and *Abdiel Edwards*, Respondents.

Sir Maurice Eustace, being mortgagee in possession of the Lordship of Baltinglass, in the County of Wicklow, took upon him to make leases of the estate; and by indenture, dated the 24th of April, 1683, he demised the lands of Ballynure, part of the said lordship, containing by estimation 1004 acres, to Joseph Parrott and his heirs, for the lives of Peter Parrot his son, and Joshua Parrott and Thomas Lichfield, two of his grandsons, at the yearly rent of £150. with the clause of renewal for ever, upon the determination of any and every life then and thereafter to be inserted at the nomination of the lessee, upon payment of £100. as a fine for each life so to be inserted: and it was thereby provided, that if such nomination and payment was not made, from time to time, within the space of six months after the death of any and every of the said persons, then it should and might be lawful to and for the said Sir

Maurice Eustace, his heirs and assigns, into the said demised premises to re-enter, and the same to have again, repossess and enjoy, as in his and their former estate.

James Carrol, Esq. the respondent James' grandfather, having a right to the equity of redemption of the premises, in Trinity Term, 1683, preferred his bill in the Court of Chancery in Ireland, against Sir Maurice Eustace for a redemption, which was accordingly decreed; but the lease to Parrott was confirmed. And this decree was, on the 21st of March, 1699, affirmed, upon an appeal to the House of Lords.

Joseph Parrott, the original lessee, let out several parcels of the land to under-tenants for the same lives, but at an advanced rent; particularly, he demised one parcel, containing about 600 acres, to Richard Clarke, at the rent of £100. per ann. and a fine of £56. upon the renewal of every life: he afterwards, by lease and release, dated the 1st and 2nd of July, 1709, mortgaged his lease for £100. to Morley Saunders, Esq. Doctor of Laws, then Prime Serjeant, and father of the appellant Cordelia Pendred; and in the same year, he conveyed his equity of redemption to Doctor Saunders for £332, reserving to himself 20 acres, which he was to hold under Doctor Saunders at the rent of a pepper-corn; and which also was afterwards purchased from him by Doctor Saunders, who likewise brought in the several interests of Joseph Parrott's lessees, except that of Richard Clarke.

The right of James Carroll to the estate, subject to Parrott's lease, being settled by the decree of the Court of Chancery and the judgment of the House of Lords; and Parrott's interest being vested in Doctor Saunders, by the several assignments above mentioned; and Peter Parrott, a *cestui que vie* in the lease, being dead; James Carroll, by indenture, dated the 1st of November, 1710, reciting the former lease, in consideration of £165. being the fine payable by the former lease, and the interest thereof since the death of the *cestui que vie*, demised the said lands of Ballynure to Elias Crips, in trust for Doctor Saunders, for the lives of Joshua Parrott and Thomas Litchfield, the two surviving lives in the former lease, and of Richard Clarke; reserving the same rents and accates, and with the same covenants as were contained in the former lease. And Doctor Saunders, by indenture, dated the 14th of December, 1711, renewed the lease to the said Richard Clarke for the same lives, and described in the same manner, at the rent of £100 and a fine of £56.

James Carroll, in April 1711, made a mortgage of his estate to Doctor Duncan Cuming in fee, for £700: and by his will, dated the 28th of November, 1711, he devised all his estate in the said lands to the said Doctor Duncan Cuming and Caleb Thomas, in trust for the issue male or female of his own body, if he should leave any; and for want of such issue, then to the use of his grandson, the respondent, James Carroll Griffith, and the heirs of his body. And in 1712 the testator died without issue, and without altering or revoking his will; whereby the estate, subject to the said mortgage, vested in the respondent Griffith, who was then an infant of about five years old, and did not attain his full age till the year 1728.

During all this time, Doctor Saunders never applied for a renewal of his lease; pretending he was not informed, nor ever inquired whether Joshua Parrott and Thomas Litchfield, the *cestui que vies* in the original lease, were living or dead; and yet in this interval he renewed the leases of his under-tenants, and took fines upon inserting new lives, which he alleged was done rather to oblige the tenants, than because it was in any way necessary. Accordingly, on the 30th of September, 1727, he renewed the lease to Richard Clarke, for the following lives; viz. the life of Joshua Parrott, (describing him by the name of Joshua Parrott son of Joshua Parrott, late of Ballynure,) the life of John Winnett, (whose name was inserted in the place of Thomas Litchfield, and for which a fine of £56. was paid,) and the life of the said Richard Clarke.

There was one Joshua Parrott, then living in the neighbourhood of the estate, who was the son of Joshua Parrott, the real *cestui que vie* in the original lease, and grandson of Joseph Parrott the first lessee: but no reason could be assigned why the description of the *cestui que vie* in the original lease, who was therein called Joshua the grandson of Joseph, should be varied in the renewed lease, and he should be therein styled Joshua, the son of Joshua Parrott; unless it was done with a view, that from the identity of the name of both these persons, and of their fathers and family, and place of abode, (in which description both of them exactly agreed,) and by leaving out of this and all future renewals, the distinction of his being the grandson of Joseph, (which was the circumstance in which they differed,) a reputation and belief might be gained amongst the under-tenants and neighbourhood, that Joshua Parrott, mentioned in the renewed lease, was the real and original *cestui que vie*; and that the respon-

dent Griffith, who was then an infant, and his trustees, who were entire strangers to all the transactions relating to the original or renewed leases, might afterwards be imposed upon, and induced to believe the same thing: and accordingly, in all the leases afterwards made of that part of the estate, either by Doctor Saunders, or by Richard Clarke, Joshua Parrott was also described as the son of Joshua Parrott, and not as the grandson of Joseph Parrott.

The respondent Griffith attained his age in 1728; and soon after paid off Doctor Cuming's mortgage, and had it assigned to the respondent Edwards in trust for him.

Richard Clarke, one of the *cestui que vies* in Doctor Saunders' lease, and a lessee of part of the premises under Doctor Saunders, died on the 29th of January, 1729; having made his will, whereby he devised his interest in the premises to his nephew George Alcock; who, being thereby entitled to Mr. Clarke's lease, applied to Doctor Saunders for a renewal; and accordingly, on the 7th of April, 1730, Doctor Saunders received a fine of £56. and granted a new lease for the lives of Joshua Parrott the son of Joshua Parrott, John Winnett, and the said George Alcock, whose life was inserted in the place of the deceased Richard Clarke.

Although Doctor Saunders renewed the lease and received the fine of his under-tenant Alcock, in about two months after the death of Clarke the *cestui que vie;* yet it was near three years before he applied to the respondent Griffith for a renewal, or gave him any notice of Clarke's death.

But on the 19th of February, 1732, he wrote a letter, informing him that Mr. Clarke was dead, and desiring a meeting to be appointed for renewing the lease and paying the fine; and in his letter, named George Alcock as the life to be substituted in the place of Mr. Clarke. Upon the receipt of this letter, the respondent went with Mr. Anderson his Attorney, to Doctor Saunders' house in Dublin; when he proposed to renew the lease and pay the fine, for inserting the name of George Alcock in the place of Richard Clarke, and offered a Banker's note as a tender of the money; and the respondent inquiring how long Clarke had been dead, Doctor Saunders answered, that Clarke had been dead 12 or 13 months; but that he was willing to pay interest for the fine, from the time the lease ought to have been renewed: and upon further discourse, the respondent, or his agent, mentioned that they had some information that Joshua Parrott, the *cestui que vie* in the original lease, was dead; and having inquired whether Thomas

Litchfield, the other *cestui que vie*, was living or not, Doctor Saunders declared, that the said Parrott was still living, and said he was a poor old man; and that about three weeks or a month before, he had seen him and given him a piece of money; he also affirmed, that Thomas Litchfield was alive, and was at that time in the country; and the Doctor then insisting upon the tender which he had made, or that the respondent should go to the banker's, who would pay down the money; the respondent and his agent, trusting to the Doctor's affirmation, that Clarke had been dead no more than twelve or thirteen months, and that Thomas Litchfield and Joshua Parrott were both living, declared they would admit the bank note as a sufficient tender, and would not take advantage of the lapse of time since the decease of Clarke, provided Doctor Saunders made it appear that Parrot and Litchfield, the other *cestui que vies*, were still living; but Doctor Saunders pretending he was soon to go out of town, and that his attorney was at that time in the country, it was agreed to put off the farther consideration of the affair to the next Easter term.

During this interval, the respondent found that Richard Clarke had been dead about three years, and that Doctor Saunders had renewed the lease to Clarke's executor, near three years before the last meeting. This manifest attempt to impose upon the respondent, put him upon a more strict inquiry after the other lives, and at last he discovered, that Joshua Parrott, who passed in the neighbourhood for the *cestui que vie* in the lease, and to whom Doctor Saunders pretended he had given a piece of money, was great grandson, and not the grandson of Joseph Parrot named in the lease of 1683, and 1710, and was, at the time of the inquiry, about thirty years old: he also found that Joshua Parrott, the grandson of Joseph, and Thomas Litchfield, the two real *cestui que vies*, had been soldiers in the service of Queen Anne: and that it was the general reputation, that the said Joshua Parrott was killed at the seige of Mercia, in the year 1705 or 1706, and was never heard of afterwards; and that Thomas Litchfield had died on shipboard, in his voyage from the seige of Barcelona, in or about the same year; and that his widow had been married above twenty years to a second husband. Upon these discoveries it appearing that Doctor Saunders had been guilty of great misrepresentation and concealment of the truth, with a design to impose on the respondent, he declined all further meetings, and gave him to understand that he should not

renew the lease, which he insisted was absolutely determined upon the death of Richard Clarke.

Doctor Saunders therefore, in Trinity term, 1733, filed a bill in the court of Exchequer in Ireland, against the respondent, and Francis Anderson his attorney, who attended at the meeting above mentioned, and against the representatives of Doctor Duncan Cuming, the mortgagee, who died sometime before; and set forth, that he had been informed in the year 1732 of the death of Richard Clarke, and had on the 19th of February, 1732, informed the respondent thereof, and tendered a fine to him, for inserting the name of George Alcock in the room of Richard Clarke; that the respondent had promised to renew the lease, upon receiving the fine with interest from six months after the death of Richard Clarke, which he stated by his bill to have happened about January, 1731; and he also suggested, that Joshua Parrot and Thomas Litchfield, the two lives mentioned in the leases of 1683 and 1710, were still living; but as they had been a great number of years out of the kingdom and not heard of, he was willing to admit them to be dead, and to submit to pay fines for three lives, and to pay a fine for every seven years for each life respectively reputed dead, with interest for each respective fine, from the time that it ought to have been paid; and therefore prayed, that the respondent might be compelled to renew the lease for the lives of George Alcock, James Carthy, and John Winnett, with the reservations and provisions contained in the original lease.

The respondent, in the same term, brought an ejectment for the lands on a double demise; viz. of himself and the respondent Edwards, as the assignee of Doctor Cuming's mortgage.

On the 26th of May, 1733, the respondent put in his answer to Doctor Saunders' bill, and admitted the application made to him in 1732, for a renewal and the tender of a fine; and set forth the conversation had with Doctor Saunders on that occasion, in the manner above-mentioned; and admitted the promise not to take advantage of the lapse of time since Clarke's decease, under the proviso and restrictions before stated; but he relied on the legal determination of the lease, and insisted on Doctor Saunders' misrepresentation of the time of Clarke's death, his concealing the death of Litchfield and Parrott, and his varying the description of Joshua Parrott in the lease to his under tenants, so as to make it tally with a person then in being,

and thereby induce a belief of his being the original *cestui que vie*, as so many fraudulent acts; and for which reasons he ought not to have any assistance or relief in a court of Equity.

Doctor Saunders afterwards amended his bill, setting forth the proceedings on the ejectment, and making the respondent Edwards a party, and praying an injunction; which the court granted till the hearing of the cause, on his paying the rent and arrear then due, and on his entering into a recognizance to be acountable for the mesne profits of the lands from the death of Richard Clarke, subject to the further order of the court.

The respondent Carroll put in his answer to the amended bill; and in Easter term 1734, filed a cross bill against Doctor Saunders and his under-lessees, the tenants of the land; wherein he set forth the death of all the *cestui que vies* in Doctor Saunders's lease, and charged the several fraudulent practises above mentioned, to conceal or misrepresent the time of their deaths; and prayed, that the defendant Saunders might account for the rent and arrears to the death of Richard Clarke, and for the mesne profits from that time, or for what he might have made thereof without his wilful default.

Doctor Saunders put in an answer to this bill; and admitted that he had renewed the lease to Richard Clarke in 1727, and had received a fine for inserting the name of John Winnett in the place of Thomas Litchfield; and yet pretended, he had no reason to believe that Thomas Litchfield was dead. He also admitted, that he might have said at the meeting with the respondent Carroll and his agent, in February, 1732, that Thomas Litchfield was alive and in the country; but said he knew nothing of him, or where to inquire about him. He admitted that Joshua Parrott, the son of Joshua Parrot, was named as a *cestui que vie* in the leases which he made to Richard Clarke and George Alcock, but pretended it was by the mistake of the clerk who engrossed the deed, and not with any fraudulent view. He also admitted, that he told the respondent at the meeting in February 1732, that Joshua Parrott, the original *cestui que vie*, was alive, and lived in the neighbourhood of the estate; that he had lately seen him and given him a piece of money, and that he was a poor old man: but said that he afterwards found himself mistaken, and that the person he meant was not the *cestui que vie*, and that he seemed to him to be a middle-aged man, or somewhat advanced in years.

Issue being joined in both causes, and several witnesses

examined in the original cause, and publication passed, both causes came on to be heard together, on the 8th, 10th and 11th of November, 1736; when it was ordered and decreed, that the original will of Dr. Morley Saunders should be dismissed with costs, and that the injunction should be dissolved; and that the cross bill should be retained, until after a trial at law should be had on the ejectment brought by the respondent for the recovery of the premises, and the respondent was thereby at liberty to enrol the said decree with costs; which was accordingly done.

On the 5th of April, 1737, and before a trial could be had on the ejectment, Doctor Saunders died, leaving the appellant, Cordelia, then the wife of George Pendred, Esq. his only issue and heir at law; but before his death he made his will, dated the 4th of April, 1737, and thereby devised the residue of all his real and personal estate (except some particular estates not comprised in the said leases, which were by the will devised to Frances his wife, for her jointure) to the appellant John Hawkshaw, Isaac Dobson, Esq. and Thomas Medlicott, gent. and their heirs, in trust for the payment of his debts; and then in trust, to permit the appellant Cordelia, to receive the profits to her separate use during her life; and after her death, in trust for the appellant Morlay Pendred, eldest son of the appellant Cordelia, and the heirs of his body, with several remainders over; and appointed the said John Hawkshaw, Frances Saunders and Thomas Medlicott, executors of his will; who proved the same, and took upon them the execution of the trust.

The ejectment brought by the respondent in 1733, having abated by the death of Doctor Saunders, the respondent, as of Easter term, 1737, brought a new ejectment in the name of Samuel Cooke, lessee of both the respondents; to which the said Medlicott and the appellant Hawkshaw, made their defence; and the same having been tried at Wicklow, at the Summer assizes, 1737, and the said Medlicott and the appellant Hawkshaw not offering any evidence whatsoever to shew that any of the lives were in being, the respondent Griffith obtained a verdict; but by mistake in the declaration, as to the time of laying the demise, he got a verdict only for three-fourths of the said lands; the demise being laid before one of the coheirs of Doctor Cuming had assigned to the respondent Edwards: and the respondent having obtained judgment on this verdict, Medlicott and the appellant Hawkshaw brought a writ of error in the Exchequer chamber to stay execution.

The respondent therefore, in Easter term, 1738, brought a new ejectment on his own demise for the whole lands, to which Medlicott and the appellant Hawkshaw made defence; and the respondent obtained a verdict at the then next assizes, and in Michaelmas term following, entered up judgment thereon; whereupon Medlicott and the appellant Hawkshaw brought another writ of error, which they afterwards withdrew; so that the respondent was, by *habere facias possessionem*, put into possession of the premises on the 2d of April, 1739.

The cross cause having been duly revived, came on to be heard upon the 8th of June, 1741, when it was decreed that it should be referred to the Chief Remembrancer, or his deputy, to state an account between the respondent and the executors of Doctor Saunders, of the rents, accates and duties of the premises, according to the rent reserved by the lease made by James Carroll to the said Doctor Saunders, until the death of the said Richard Clarke; and it was also ordered, that the said Thomas Medlicott, Frances Saunders, and the appellant Hawkshaw, executors of Doctor Saunders, should account with the respondent for what they or their testator made or might have made, without his or their wilful default, out of the premises, from the death of Richard Clarke, till the respondent was put in possession.

D. Ryder.
T. Clarke.

From these decrees the present appeal was brought; and on behalf of the appellants it was insisted, that no proof had been made of any fraud or designed misrepresentation in Doctor Saunders; or that he had any notice of the deaths either of Parrott or Litchfield, at the time of his application for a renewal. That it was impossible, from the evidence, to fix when Doctor Saunders ought to have demanded a renewal, so as to save his lease; unless the exact point of time could be ascertained, when the presumption of their being alive ceased, and of their being dead began; and consequently, there was no proof of a breach of the covenant for renewal by any lapse of time. If it was to be supposed that Parrott and Litchfield were dead in the wars, before the lease granted by the respondent's ancestor to Doctor Saunders, it was the fault of the lessor to grant such a lease; but it was to be presumed that they were then living, not the least evidence had been offered of their deaths, but only of their long absence. And it would be of very fatal consequence to lessees of this kind, who were very numerous in Ireland, to be obliged, upon

pain of forfeiting their leases, to make applications to renew, before they have notice of the deaths of their *cestui que vies*; especially as it is in the power of the landlord, by the Irish statute of 7 Will.* 3. c. 8, to call upon his

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* Those whose real interests attached on the non-existence of others, were by the common law greatly delayed in legally obtaining possession of their estates, and that, though the lives upon which they depended were at an end, owing to the almost insuperable difficulty of proving that circumstance.—*Run. on Eject.* 325.

Difficulty at common law to prove the drop of a life.

The remedy for this evil at the common law is, in England the 19 Car. 2. c. 6.

The 7 Will. 3. c. 8. *Ir.*, is very nearly a transcript of this English act; save that so much of the 19 Car. 2, as relates to copyhold tenants is omitted in the latter, and that the clause of the 7 W. 3., which corresponds in substance with the second section of the 19 Car. is more concisely worded.—1 *Gabb. Dig.* 461.

The following is the Irish Statute, 7 Will. 3. c. 8.

An act for redress of inconveniences for want of proof of the deceases of persons beyond the seas, or absenting themselves, upon whose lives estates do depend.

"Whereas divers lords of manors and others have used to grant estates by lease for one or more life or lives, or else for years determinable upon one or more life or lives; and it hath often happened, that such person or persons, for whose life or lives such estates have been granted, have gone beyond the seas and absented themselves for many years, that the lessors and reversioners cannot find out whether such person or persons be alive or dead, by reason whereof such lessors or reversioners have been held out of possession of their tenements for many years after all the lives upon which such estates depend are dead, in regard that the lessors and the reversioners, when they have brought actions for the recovery of their tenements, have been put upon it to prove the death of their tenants, when it is almost impossible for them to discover the same: for remedy of which mischief so frequently happening to such lessors or reversioners, be it enacted, that if such person or persons, for whose life or lives such estates have been or shall be granted as aforesaid, shall remain beyond the seas, or elsewhere absent themselves in this realm, by the space of seven years together, and no sufficient and evident proof be made of the lives of such person or persons respectively, in any action commenced for the recovery of such tenements by the lessors or reversioners, their heirs or assigns; the judges before whom such action shall be brought, shall direct the jury to give their verdict, as if the person so remaining beyond the seas, or otherwise absenting himself, were dead.—*s.* 1.

Mischief to lessors and reversioners, by being put to prove the death of persons for whose lives estates held.

Persons for whose lives estates granted, absent or beyond seas for seven years, and no proof of their lives in action by lessor or reversioner, shall be accounted as dead.

"And be it further enacted, that in any such action wherein the life or death of any such person or persons shall come in ques-

Jurors upon such trial, the

lessee, after seven years absence of a nominee or *cestui que vie*, and oblige him to prove him to be living. But supposing Doctor Saunders to have been guilty of any neglect or delay in this case, it is the constant practice of courts of Equity to relieve against a lapse of time in the performance of covenants or conditions, where, as in the present case, a compensation can be made for the delay; and more especially, where such lapse of time has happened by mistake or accident, and where the injury arising from a refusal of relief will be irreparable, by losing the estate itself, and all the improvements made upon it in confidence of a continuance of the lease.

On the other side it was contended, that the lease being determined, and the time of renewal long since elapsed, and

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greatest part of whose estate held by leases for lives, may be challenged.

tion between the lessor or reversioner, and the tenant in possession, it shall and may be lawful for the lessor or reversioner to take exception to any of the jurors returned for the trial of that cause, that the greatest part or the real estate of any such juror is held by lease for life or lives, who upon proof thereof, shall be set aside, as in case of other legal challenges.—*s.* 2.

If said persons return after, or proved to have been living at time of eviction, lessee may re-enter and recover damages the full profits received, with interest, as well where said persons are dead at time of bringing the action, as if living.

"Provided always, and be it enacted, that if any person or persons shall be evicted out of any lands or tenements by virtue of this act, and afterwards, if such person or persons, upon whose life or lives such estate or estates depend, shall return again from beyond the seas, or shall on proof, in any action to be brought for the recovery of the same, be made appear to be living, or to have been living at the time of the eviction, that then and from thenceforth, the tenant or lessee, who was ousted of the same, his or their executors, administrators or assigns, shall or may re-enter, re-possess, have, hold, and enjoy the said lands or tenements, as in his or their former estate, for and during the life or lives, or so long term as the said person or persons upon whose life or lives the said estate or estates depend, shall be living; and shall also upon action or actions to be brought by him or them against the lessors, reversioners, or tenants in possession, or other persons respectively, which since the time of the said eviction received the profits of the said lands or tenements, recover for damages the full profits of the said lands or tenements respectively, with lawful interest, for and from the time that he or they were ousted of the said lands or tenements, and kept and held out of the same by the said lessors, reversioners, tenants, or other persons, who after the said eviction, received the profits of the said lands or tenements, or any of them respectively, as well in the case where the said person or persons, upon whose life or lives such estate or estates did depend, are or shall be dead at the time of bringing the said action or actions, as if the said person or persons were then living."—*s.* 3.

Doctor Saunders having declined all applications to add to any new life, till near three years after the decease of the surviving *cestui que vie*, [there was no foundation to relieve against the lapse of time, even supposing it to have happened from an innocent neglect: because it was an essential part of the agreement, that the new life should be named within the limited time; and inserted for this particular purpose, that the lessor might from thenceforth have his chance of a new fine, by the death of the new *cestui que vie*; and therefore a court of Equity could not dispense with the lessee's neglect of nomination, without destroying a substantial part of the contract, and depriving the lessor of a beneficial chance, for which the court could not give a compensation.] That Doctor Saunders appeared, from a variety of circumstances, to have acted a very unfair part, not only by changing the description of one of the *cestui que vies*, but also in attempting, by concealment and misrepresentation of the truth, to ensnare the respondent into a renewal: for it was in proof, that upon the treaty in February, 1732, in Dublin, and upon the respondent's desiring to know how long Clarke had been dead, Doctor Saunders affirmed, that he had been dead only thirteen or fourteen months, though he knew that Clarke had been dead near three years, and though he had actually, on the 7th of April, 1730, renewed a lease with George Alcock, who was Clarke's devisee. And when the respondent, at the same time, inquired what was become of Thomas Litchfield, one of the original *cestui qui vies*, Doctor Saunders falsely affirmed, that he was in the country; though in the year 1727 he had renewed an under lease for the life of John Winnett, in the room of Litchfield, and took £56 for it, which was the full fine for adding a new life. And as to Joshua Parrott, the original *vestui que vie*, whose description was varied in the renewed leases, as before mentioned, the respondent having some suspicion of his death, particularly inquired of Doctor Saunders, during the treaty, if he was then living: to which the Doctor affirmed, and repeated the affirmation, that Joshua Parrott, the *cestui que vie* in the lease, was alive, and had been with him about three weeks or a month before, and was a poor old man, to whom he had given a piece of money. All which now appeared to be a manifest untruth. As to the pretence, that the description of this man was varied by the mistake of the engrossing clerk, there was not the least proof, or even a probability of it; for there was nothing that could mislead the person who drew or en-

W. Murray, J. Browne.

This fraud was the point on which this case turned, and not on the preceding reasoning of the counsel for the respondent. *Note by Editor.*

grossed the new lease, it being naturally the practice to follow the descriptions of the old leases, and not to form new and different ones. It was therefore hoped, that after so long an acquiescence under the decree of November, 1736, for dismission of the original bill, and after the trial of two ejectments, and verdicts obtained in both, the decrees would be affirmed, and the appeal dismissed with exemplary costs.

Decree affirmed

Accordingly, after hearing counsel on this appeal, it was *ordered* and *adjudged*, that the same should be dismissed; and the decrees therein complained of, affirmed: and it was further ordered, that the appellants should pay to the respondents, £100 for their costs, in respect of the said appeal.—4 *Bro. Par. Ca.* 512.

Observations on the Case of Pendred v. *Griffith.*

This is the third reported case on the subject of renewals in Ireland; and in it, as in the two former, the decree of the court of Exchequer in Ireland, was affirmed by the House of Lords in England. In this case, as well as in the preceding one of *Ross* v. *Worsop*, Chief Baron Marlay presided in the Irish court of Exchequer; both these cases contain negative clauses, that is, special provisoes, that the tenant's right of renewal should be lost, if he neglected to renew within the time prescribed; a circumstance which distinguishes both these cases from the first one of *Sweet* v. *Anderson.* In this third case the renewal was refused by the Exchequer, and its decree affirmed; but the ground upon which the renewal was refused, has been a matter of some controversy, although not now of any doubt. The difference of opinion turned on the question, whether the renewal in this case was refused on the ground, that the tenant had lapsed his time, or that he had acted with fraud to the landlord: the latter is the better and now established opinion. It seems that the former opinion had been adopted in a judgment imputed to Lord Mansfield, in the case of *Kane* v. *Hamilton*, given by Mr. Ridgeway, not on his own authority, but from the contribution of a professional gentleman, in respect to whose accuracy Mr. Ridgeway expresses his strong reliance: according to this source the following opinion on this case is imputed to Lord Mansfield.

"These cases, (*Sweet* v. *Anderson*, and *Ross* v. *Worsop*,) therefore, turning upon their peculiar circumstances, did not establish any general rule as contended by the respondent, and this is proved by the case of *Pendred* v. *Griffith*, in 1744, where the decree was founded on the lapse and omission to renew within the time limited."—1 *Ridg.* P. C. 185.

Opinion of Lord Mansfield on Pendred v. Griffith;

In respect to this opinion so imputed to Lord Mansfield, Mr. Ridgeway presumes to express a different opinion, in the following note:—

of Mr. Ridgeway;

"*Quere.* Was not the fraud of the tenant in concealing the death of the *cestui que vie*, a much stronger foundation for refusing a renewal?"—*Ibid.*

This opinion of Mr. Ridgeway was many years afterwards adopted and sanctioned by the high authority of Lord Chancellor Redesdale, in the words following:—

and of Lord Redesdale. Contra.

"The next case is *Pendred* v. *Griffith*, which is not fairly stated in the judgment attributed to Lord Mansfield, in *Kane* v. *Hamilton*: that was a case of gross fraud, the tenant taking advantage of the ignorance of his own lessor, and taking fines himself from his under-tenants upon the fall of the very lives, upon which he ought to have paid fines himself. That must have been decided as a case of gross fraud, and yet Lord Mansfield is made to state it as dependent only on lapse of time."—2 *Scho. and Lef.* 682.

These two variant views in respect to this case, afford one of the most important distinctions that occur in the law respecting this subject; namely, whether the case be one of fraud or mere neglect, in respect to which the law has long been, that equity will not grant a renewal in the case of fraud, though it will in that of mere neglect. But it seems that this opinion had not been adopted by Lord Mansfield at the time when he gave his judgment in *Kane* v. *Hamilton*; and that he was then of opinion that mere lapse of time might forfeit the right of the tenant to a renewal. It would also seem that he endeavoured to press the particular case of *Pendred* v. *Griffith* into the support of that view of this subject, namely, that mere lapse of time would justify a forfeiture. But it appears that this case does not sustain that view of its exclusive or indeed its proper application; because it is clear, that the conduct of Doctor Saunders, who here represents the claim of the tenant, was tainted with abundant suppressions of truth, and suggestions of falsehood for the interest of himself, and against that of his landlord, to justify a court of Equity in adopting that paramount and outside view which

must disentitle him to the relief he claimed; and to justify every reader of this case in the opinion that his conduct *prima facie* was so strongly objectionable as not to permit the denial of his application for a renewal to rest on any other ground, save his conduct, that is, his misconduct alone. There never was a question at any time among lawyers, but that clear fraud in the applicant would disentitle him to a renewal, independently of any other reasons; and as in this case the fraud of Doctor Saunders was clear, it never can with reason be contended, that this case was decided upon any other ground, or that mere lapse of time could make any part of that ground: to say the least of it, on the latter point, this case must be perfectly neutral; and does not at all stand in the way of the long line of authorities from Chief Baron Gilbert downwards; uniting to shew that the equity of Ireland, has uniformly relieved, against mere lapse of time in the tenant, with the exception of two or three cases that occurred in the interval between *Bateman* v. *Murray*, and the time when the appellate jurisdiction was removed from the House of Lords in England to that of Ireland. The Editor apprehends under the sanction of Lord Lifford, that the cases in that interval operate as an exception under an extraordinary state of things, and prove nothing either way.

Lord Redesdale with great propriety expresses an uncertainty whether the opinion here imputed through Mr. Ridgeway to Lord Mansfield, can with accuracy be attached to that noble judge as his opinion; for Lord Redesdale speaks of it, as the *supposed* opinion of Lord Mansfield, and the opinion imputed to Lord Mansfield. The effort of Lord Redesdale to disconnect it from Lord Mansfield, is amongst the proofs that Lord Redesdale does not deem it sustainable; and this effort is still more strongly supported by Lord Redesdale in his full answer to the argument, under whatever sanction it may be introduced. The case however of *Pendred* v. *Griffith* supplies some internal evidence that Mr. Ridgeway or his friend was but too accurate in imputing this objectionable opinion to Lord Mansfield. It appears from this case that W. Murray was one of the two advocates, who argued for the respondents in *Pendred* v. *Griffith*, before the Lords in England; that was in the year 1744. The Hon. William Murray (Earl of Mansfield) was called to the bar in 1731; he was the fourth son of the Earl of Stormont, and connecting his high lineage with the highest collegiate education, he came into full business *im-*

mediately, and there was no interval between his first appearance at the bar, and his being thereafter universally resorted to in all matters of consequence, as well as on every thing public or interesting. It is therefore clear he was in eminent business in the year 1744: and there is every reason to suppose that he was the same W. Murray mentioned by the reporter Brown, as one of the two advocates in the appeal cause of *Pendred* v. *Griffith*. Certain it is, that a part of the argument, by these advocates in this case, and all the objectionable part of their argument, is of the same tenor with that subsequent judgment imputed to Lord Mansfield in *Kane* v. *Hamilton*.

For the purpose of this observation the Editor has only to refer to the first part of the argument by the advocates for the respondents which he has included within brackets; *vide ante*, *p.* 41, all of which he presumes to say is untenable argument on this subject; but yet squares with the judgment imputed to Lord Mansfield in *Kane* v. *Hamilton*. The strong, and the only strong part of their argument is, he submits that which follows after, namely, the fraud of Dr. Saunders; and constitutes, as he apprehends, the sufficient and exclusive point on which this case turned.

The next Case is (29*th March*, 1765,)

Charles Vipont Charles, Esq. Appellant.
The Right Hon. Hercules Langford Rowley, Respondent.

To a bill brought for the renewal of a lease for lives, the defendant pleads the minutes of a decree in a former suit brought for the same purpose, by the person under whom the present plaintiff claimed, and by which minutes, the court ordered that bill to be dismissed. This plea ought not to be allowed, but should stand for an answer, with liberty to except.

Sir Arthur Langford, Bart., deceased, being seised in fee of the several towns and lands of Piercetown, Landy and others, part whereof were by him purchased from the Earl of Bellamount, did by lease dated the 22d of March, 1697, demise the same to John Charles, his heirs and assigns, for the lives of Alice his wife, and Richard Charles their eldest son, and of John Ward, son of Edward and Margaret Ward, sister of the said Alice Charles, and the longest liver of them, at the rent of £366, payable half-yearly, on every 1st day of May, and 1st day of November, over and above quit rents, crown rents, patent and chief rents, and all other taxes of what nature soever: with a covenant of renewal upon payment, by the said John Charles, his heirs or assigns, of a fine of £100, to Sir Arthur Langford, his heirs or assigns, having then the immediate inheritance of the

The register's minutes of a decree dismissing a bill, are not pleadable in bar to another suit brought for the same matter; for minutes are but evidence of the judgment of the court, and the groundwork of the decree, but are by no means conclusive; being sometimes mistaken by the officer, and often rectified and varied by the court, upon a summary application.

lands, within one year next after the decease of any of the persons for whose lives the lease was made; the person paying such fine, having two lives remaining and undetermined, and presenting a pair of indentures of lease, fairly drawn and engrossed upon parchment, purporting a demise of the premises for the two surviving lives, and that of the other person then to be nominated, and the lives of the longest liver of them, under the same reservations, covenants, and clauses of renewal, as in the original lease; with a farther covenant for renewing for ever on the like terms; and also a covenant restraining the said John Charles, his executors, administrators and assigns, from giving, selling, granting or alienating his or their estate in the premises, or any part thereof, to any person or persons, other than the wife, children, grandchildren, or posterity of the said John Charles, without the consent of Sir Arthur Langford, his heirs or assigns, first had and obtained in writing under hand and seal.

By virtue of this lease, John Charles entered; but was soon after disturbed in his possession, and involved in several disputes and suits with other persons claiming title to several parts of the demised premises, which suits Sir Arthur Langford, by letters and otherwise, directed him to litigate and defend his title against, promising him an allowance for his costs and expenses therein; whereupon John Charles, besides time and trouble, expended upwards of £400 in defending and establishing his title. And encouraged by the permanent interest he had in the lands, then lying waste and uncultivated, he laid out more than £1500, (the best part of his fortune) in great and lasting improvements thereon, whereby they became much more valuable than when the lease was made, the reserved rent being high, and the bargain a dear one.

Alice Charles, one of the *cestui que vies*, died on the 9th of May, 1710, of which Sir Arthur Langford was soon after informed; but no account being then settled of the allowance to be made John Charles, for the money by him expended in defence of the title, which amounted to much more than the £100 fine, payable on this renewal, he within a year after Alice Charles's death, applied to Sir Arthur Langford for a new lease, offering to deduct the £100 fine out of the money due to him, which Sir Arthur agreed to, but the execution of the renewed lease was, by consent of both parties, deferred till the account of Charles's disbursements should be settled; and Sir Arthur Langford at seve-

ral times after the expiration of the year, and particularly some short time before his death, declared to John Charles and several others, that he would not only renew the lease, but bestow the fine due thereon upon one of John Charles's daughters, and would allow him his costs and expenses in defending the title and possession of the premises. And Sir Arthur, so late as the year 1714, by letters and otherwise, directed John Charles to make several freeholders on the lands; which he accordingly did, by making leases for lives renewable for ever of several parts of the premises, all which made John Charles less pressing for an actual renewal, until the latter end of the year 1715, when Sir Arthur being in a bad state of health, John Charles raised as much money as, with the costs and expenses he had been at in defence of the title, amounted to the rent he owed and the fine for the renewal, and went therewith to Sir Arthur's house, in order to settle accounts, and pay what remained due for the rent and fine, in case this latter should be demanded, and so get a renewal of the lease: but Sir Arthur was in so weak a state, that Charles was not permitted to speak to him upon business, but only directed to pay what money he thought proper to Sir Arthur's receiver, George Dennis, and he accordingly paid him a considerable sum; but Dennis not being empowered to settle the accounts, Charles was forced to defer it until Sir Arthur's recovery, when he received assurances that he should also obtain the the renewal of his lease.

Sir Arthur Langford's disorder increased, in so much that he died about April, 1716, having by his will, dated the 1st of December, 1715, devised the premises to his nephew, Hercules Rowley, Esq. and the heirs of his body, remainder to his own right heirs; with power to the said Hercules and his issue to make leases for lives renewable for ever, or for such terms of years as they should think proper. He thereby also directed, that such of his tenants as should pay off their arrears in twelve months after his death, should be allowed one full half-year's rent of their then holdings; and appointed the said Hercules Rowley sole executor, who proved the will. Long before the expiration of the twelve months, given by the will to the tenants for paying their arrears, Mr. Rowley came to England, and remained there near two years; so that Charles had, during that time, no opportunity of settling his account of expenses, and the quantum of his rent remaining due, so as to demand a renewal of his lease; but soon after Mr. Row-

ley's return to Ireland, he applied to him for the settlement of his accounts, for an abatement of one half-year's rent, pursuant to Sir Arthur Langford's will, and for a renewal of his lease; which being refused by Mr. Rowley, Charles, in order to take away all colour of excuse against such renewal, on the 2d of May, 1718, paid off all the rent due for the premises to the 1st of November then last, without having any manner of credit or allowance given him; and at the same time offered Mr. Rowley £100 as a fine for renewing the lease, with interest from the 9th of March, 1711, the period when in strictness the lease ought to have been renewed down to that time; and a further sum of £100, for a second renewal, upon a supposition, that had the lease been renewed and a life inserted on the 9th of March, 1711, such life would have subsisted for seven years and no longer, and interest for the same, both which Mr. Rowley refused; and Charles afterwards acquainting Mr. Rowley, that he was advised to make him a tender in specie, Mr. Rowley promised to meet him at Henry's bank in Dublin, on the 30th of January, 1719, where they accordingly met; and Charles, in the presence of several persons, tendered Mr. Rowley, in specie, the fines and interest aforesaid, and therewith a pair of indentures of lease to be executed, purporting to be a renewal of, and in every particular agreeing with the original lease, other than the change of the name of the said Alice Charles for that of Thomas Hendrick, the life named to be inserted in her place, offering and tendering to seal, deliver, and perfect as his act and deed, a counterpart of such new lease, and to surrender or cancel the former, in case Mr. Rowley would execute the new lease; both which Mr. Rowley refused.

Whereupon John Charles, on the 29th of February, 1719, filed his bill in the court of Exchequer in Ireland, against the said Hercules Rowley; stating the several matters above-mentioned, and praying to be decreed a renewal of his lease on payment of the sum so tendered, or such other sum as the court should think proper, and likewise to be decreed the costs and expenses he had been at in defending the title of the lands.

Mr. Rowley, in the year 1720, put in his answer; and the cause being at issue, witnesses were examined, and publication passed; but notwithstanding John Charles fully proved the money expended by Sir Arthur Langford's directions, his promises both of repayment and renewal,

and the several matters in his will; yet the court, on the 21st of February, 1723, pronounced the following order: "*Cur.* Dismiss the bill so far as relates to the renewal of said lease, and let it be referred to the Chief Remembrancer of this court, or his deputy, to take an account as to the £150, which the said John Charles was at in defending the title and possession of the said lands and premises."

John Charles being ill at the time of pronouncing this order, continued so about three months, and died on the 2d of June, 1724, leaving Richard Charles, his eldest son and heir, and by his death the suit abated; but had he lived, he intended either to have re-heard the cause, or appealed; being so well satisfied of his right of renewal, that, subsequent to this order, he made his will dated the 30th of May, 1724, whereby he devised the said lands and premises to his son Elijah Charles, Joshua Henzell, and Frances Charles, his eldest daughter, and to their heirs, (subject to some annuities and legacies, since determined and paid off) to the use of the said Elijah Charles for life, remainder to his first and every other son in tail male; remainder to the said Frances Charles, for her life, remainder to her first and every other son in tail male; (such sons and others descending from the said Frances, taking the sirname of Charles,) remainder to his daughter Eleanor Henzell, for life, remainder to her first and every other son in tail male; remainder to the issue female of the said Elijah, Frances and Eleanor, equally to be divided; and appointed his son Elijah Charles, the said Joshua Henzell, and the said Frances Charles, his executors.

Elijah Charles entered upon the premises under his father's will, but being barely tenant for life, and having no issue, though married several years before his father's death; and being through misfortunes in trade, obliged to secrete himself from his creditors, he did not, in his time, endeavour to compel a renewal of the lease.

Joshua Henzell died about the year 1728, leaving Eleanor his widow, and one son, Bigoe Henzel, and about October 1742, Mr. Rowley died, having by his will devised all his real and personal estate to the respondent his eldest son and his heirs, subject to some annuities and legacies; and appointed him, with Frances Rowley, his widow, and Richard Wingfield, Esq. his executors, but the respondent only proved the will; and by Mr. Rowley's death the suit totally abated.

Frances Charles, the eldest daughter of John Charles,

in the year 1727, married William Vipont, and had issue by him the appellant, her only child. The appellant's father died about the year 1740, having by his will appointed Luke Vipont the appellant's guardian during his minority; and Frances, the appellant's mother also died in 1741, leaving the appellant, her only son and heir, then an infant about ten years old.

Elijah Charles having survived his co-executors and trustees, Joshua Henzell and Frances Charles, died in the month of February, 1743, without ever having had issue, leaving his wife Alice his executrix; and upon his death the appellant, under his grandfather John Charles' will, became entitled to an estate tail in the said lands and premises, and was the proper person to whom a renewal of the lease ought to be made, pursuant to the clauses and covenants therein contained; but being only twelve years old when his title accrued, and the benefit of the lease, had he died during his minority, being by his grandfather's will limited over to the said Bigoe Henzell, his guardian, he did not think it safe or prudent (if he could possibly avoid it) to lay out his other small fortune in suing for a renewal of the lease, and paying the expenses of obtaining it.

Richard Charles, another of the *cestui que vies* in the lease, died on the 28th January, 1746, leaving John Charles, his son and heir; and Thomas Hendrick, the life proposed to have been inserted in Alice Charles's room, having also died some time before, the appellant's guardian, for preventing all charge of default on the appellant (though then an infant) in not applying for a renewal within a year after Richard Charles's death, did, together with the appellant, on the 18th of January, 1747, wait on the respondent at his house, and then paid him £527 17*s.* 2*d.* being all the rent due to the 1st day of May then last; and over and above that sum, carried with him 1502 guineas in specie, in three bags, which he tendered to the respondent, in whom the power of renewal lay, desiring him to tell the same, and take thereout what rent, if any then remained due; and also £100, as a fine for inserting a life in the room of Alice Charles, payable on the 9th of March, 1711, and a further sum of £100 at the end of every eight years after, with a proportionable interest for both, on a supposition, that had the lease been regularly renewed, from time to time, one life would have dropt in seven years, and a farther sum of £100 as a fine for inserting a life in the place of the said Richard Charles; and also tendered a surrender

of the original lease, with a pair of indentures of lease, reciting that lease, the fall of the lives, and payment of the money, by way of fine for renewal thereof, and purporting to be a demise of the lands, in pursuance of the covenant of renewal, for the life of John Ward, the surviving *cestui que vie* in the original lease, and for the lives of his then Royal Highness Prince George, and the Duke of York, and the longer liver of them, at and under the same rents, covenants and clauses of renewal as in the original lease contained; all which the respondent refused, declaring he would not put the appellant's guardian to the trouble of counting the money, but would admit the tender was properly made; and the respondent being then a member of the Irish House of Commons, and in full privilege, the appellant's guardian requested him to waive his privilege, so as to give the appellant liberty to commence a suit for renewal of the lease; but this he absolutely refused.

Alice Charles, the widow and executrix of Elijah Charles, who was the surviving executrix of John Charles, died on the 19th of November, 1758, having by her will appointed the appellant sole executor, and he afterwards proved the same.

The appellant being, during his minority, sent to England for education, on his return to Ireland in 1755, filed a bill for relief in the court of Exchequer, in the nature of a bill of revivor against the respondent and others, but being advised that such bill was improper, he dismissed it in Trinity term 1759; and in Michaelmas term following, filed an original bill in that court, against the respondent and others; and (without taking notice of the former suits between John Charles and the respondent's father) stated the matters and things contained in John Charles's bill, the death of John Charles, and the several transactions subsequent thereto; and prayed, that the respondent might be compelled to renew, by executing a lease of the lands for the lives of the said John Ward, the then Prince of Wales, and the Duke of York, with such reservations, covenants, clauses, and agreements, as in the original lease made to John Charles, upon the appellant's making such compensation or satisfaction to the respondent, as the court should think just; that the appellant might have a proper allowance for John Charles's costs and expenses, and be quieted in the possession of the lands, and the respondent enjoined from proceeding at law against him.

In April, 1760, the respondent put in a plea in bar to

the relief and discovery sought by the bill: and for that purpose pleaded, that John Charles, about the 29th day of February, 1719, filed his bill in the said court of Exchequer against the said Hercules Rowley, charging the facts previous to the 29th day of February, 1719, in effect as before set forth; that on the 12th day of May, 1720, the said Hercules Rowley put in his answer thereto; that witnesses were examined, and on the 21st day of February, 1723, the cause was heard, when it was ordered and decreed by the court, that the said bill should be dismissed, so far as it related to a renewal of the said lease; and the respondent referred to such proceedings and decree, averring, that the decree was unreversed and in full force, and no ways altered or varied since the pronouncing of it; and that the said John Charles, Hercules Rowley, Sir Arthur Langford, and the lands, lease and covenant of renewal mentioned in John Charles's bill, and the appellant's bill, were the same, and not different: he further pleaded, that John Charles or any of his representatives, or any person claiming title to the said leasehold estate under him, never took any step to appeal from the said decree, or to rehear the cause, or otherwise draw in question the justice of the decree, till filing the appellant's original bill in this cause; and that John Charles did not, in the bill filed by him against Hercules Rowley, or otherwise, name any life; nor did any other person claiming the lease under John Charles, name any life in the place of Alice Charles, till the 18th of January, 1747, and that Richard Charles, one other of the *cestui que vies* in the lease, died in or before the month of January, 1746.

The respondent also put in an answer, whereby he claimed title to the lands under Sir Arthur Langford's will; and said he believed, that by the loss of papers, he was deprived of evidence very material, to support the decree pleaded by him.

The appellant being advised that a memorandum in the register's note or minute book, of the pronouncing of such an order, could not be pleaded, as a complete decree, amended his bill; charging, that if any such cause was ever heard in that court, and such order made thereon as pretended, (which he in no wise admitted,) such order was never signed nor enrolled, nor entered, nor even drawn up, which the appellant insisted was necessary to give a judicial force and effect to the decrees and orders of that court; and before the drawing up, entering, or enrolling of which, it

was not in John Charles's power to appeal therefrom, nor rehear the cause; and therefore the appellant ought not to be bound or prejudiced by the bare pronouncing of such order, if any such was in fact really pronounced; and that no papers or writings of any consequence were lost or mislaid, as the respondent pretended.

On the 18th of March, 1761, the respondent put in a plea and answer to this amended bill; the plea in substance was the same as his former, except that he now also pleaded to the injunction prayed by the appellant's bill; and by his answer said, he believed the decree in his plea mentioned was not enrolled, nor formally drawn up or signed by the then Chief Baron of the court, but that it was duly entered in the register or remembrancer's book of the said court.

The court after hearing the plea argued for several days, pronounced the following order: "9th of February, 1763, overrule that part of the plea which goes to the discovery, and allow that part of the plea which goes to the relief prayed by the bill." This order the register entered in his note or minute book, in like manner as the former order pronounced in 1723; but the very next day, the court, *ex officio*, ordered the register to strike it out of his book, resolving to take the matter into further consideration.

The barons being divided in opinion, no decree was pronounced till the 5th December, 1763, when upon the appellant's application for judgment, the Chief Baron, although he was clearly of opinion that the benefit of the plea ought to be reserved to the hearing of the cause, with liberty to except; yet to expedite justice, by giving the applicant an opportunity of appealing, he joined with the second Baron, and ordered and decreed, that the plea put in by the respondent to the appellant's bill, should be allowed; but without prejudice to such other methods of proceeding as the appellant might be advised to take, in order to obtain the relief sought by his present bill.

Accordingly the present appeal was brought, and on the appellant's behalf it was contended, that the original suit abated by the death of Hercules Rowley, in 1742, and could not be revived, or the cause reheard, or an appeal brought by the appellant, for want of privity to his grandfather, John Charles, being neither his heir or executor; so that the appellant who alone was entitled to a renewal of the lease in question, had no remedy left, but that of bringing an original bill to establish his right. That the regis-

W. De Gray.
A. Forrester.

ter's minutes of the 21st February, 1723, were not pleadable in bar of the appellant's demand, as they were never drawn up into an order, or signed by the Chief Baron, or entered and enrolled, as is necessary for constitutiug a decree. Minutes are but evidence of the judgment of the court, and the groundwork of the decree; but are by no means conclusive, being often mistaken by the officer, and rectified or varied by the court, upon a summary application; and that they are not conclusive, but remain in the power of the court, was proved by an act of the court of Exchequer in this very cause, which on the 10th February, 1763, directed the register's minutes of their order, made the preceding day, to be struck out of his book; and yet these minutes of the 9th February, 1763, thus struck out, were of equal force with those of the 21st February, 1723, which the respondent had pleaded. That decrees, when completely such by signing and enrollment, can only be set aside by original bill, bill of review, rehearing, or appeal, as the case requires; then only can execution be taken upon them; then only do they become records, pleadable in bar; and then only are they removeable by appeal. But bare minutes of a decree were never yet revived by *scire facias*, nor execution taken thereon, nor appealed from; and if they want all those essential requisites of a complete decree, they cannot be pleadable in bar; for otherwise the drawing them up into a decree, and signing and enrolling that decree, would not only in many cases be unnecessary, but would in effect afford an easy method of eluding the jurisdiction of the dernier resort. That the length of time between the former and present suit, and the acquiescence insisted on by the respondent's plea, afforded no argument why the court should not now enter into the merits of the cause, for John Charles died within three months after the order of February, 1723, before he could rehear the cause, or bring an appeal; and it appeared by that very order, that there was a sum of £150 due to him for his expenses in defending the title. Sir Arthur Langford was therefore in 1710, when Alice Charles the first life dropped, indebted to him in more than the amount of the fine, so that he had virtually received it long within the time prescribed by the covenant; and from his whole behaviour he did not appear to have entertained any notion of a breach of covenant by John Charles, or any culpable neglect in not tendering the fine in due time. That the several tenders afterwards made by him in 1719, to Hercules Rowley, of his

utmost demand, without regard to what he himself had a right to deduct, and again renewed by his bill, left it fully in the power of the court to decree an adequate satisfaction, by giving fines at proper periods, as if the lease had been actually renewed in 1711. Upon John Charles's death matters rested in this uncertain state, until the appellant, the first devisee of the interest in the land, and who had consequently the equitable right of renewal, did by his guardian, upon the dropping of another of the original lives, renew the former tenders, and also tender the proper fine upon the life just then fallen; so that there had been a continual claim on the part of John Charles the original tenant, and the appellant his devisee, to the renewal in question; but if the plea should stand allowed, the appellant would be absolutely prevented from bringing the true merits of his case into judgment, and excusing the supposed neglect imputed to him, the plea being in bar both to the discovery and the relief; whereas, the respondent might have the full benefit of his defence by a common order made upon pleas of this nature, viz. that the plea should stand for an answer, with liberty to except, and the benefit thereof be saved to the hearing. And therefore it was hoped, that the appellant would not be precluded from bringing his cause to a fair hearing, upon the whole circumstances and merits of the case.

F. Norton. C. Yorke.

On the other side it was argued, that the condition of renewal was a precedent one, and no unavoidable accident had happened to intercept or prevent the performance of it. Alice Charles the first life, died in 1710, and no new life was ever named till thirty-seven years afterwards; an acquiescence which amounted to a derelinquishing of the claim and right of renewal. The appellant's right accrued in three months after the decree of 1723, under the will of John Charles, and yet no bill was exhibited to assert that right for thirty years; nor was there any suggestion in that bill, that there was a new life named in the place of Alice Charles, till 1747, and the fall of the second life since the decree could give no new equity; so that the present application must be considered as for a renewal in the room of Alice, who died in 1710, and was for the same matter as had been determined in 1723. That though courts of Equity may relieve where a sufficient excuse is shewn, where the fall of the lives has not been known, in cases of concealment or suppression, or where the tenant has been in no particular default, or otherwise satisfactorily

accounts for the fatality or neglect, yet they are not bound to relieve in every case; nor ought the respondent, who could never have compelled a renewal, had the lands fallen after 1710, in the same proportion as they rose, to be bound to renew, after the tenant had, for near half a century, declared his option to the contrary. That it is the duty of every court to support the decrees of their predecessors, unless fraud or error, suggested in due time, appears. The present bill did not impeach the former decree, either for fraud or error, it suggested no fatality or accident, nor sought to set it aside upon any ground; the appellant therefore could not be in any other condition than John Charles, and if this bill had been filed by him, it would have been of course referred with the former bill, to see whether they were not both for the same matter, and in consequence the latter bill must have stopped. The respondent had pleaded the judgment of the court upon the merits; the former decree being upon the merits after issue joined, and a regular examination had. The appellant was no purchaser, to entitle him to any favour in a court of Equity, but only a voluntary devisee; nor could he be entitled to any relief, but to such decree as was pronounced in 1723, against John Charles, the original lessee, under whom he claimed. And as John Charles could not have impeached that decree by an original bill, but must have sought his relief upon a rehearing, or bill of review, so the appellant, as being his devisee, could only be entitled to the same relief; and the present bill must be considered in the nature of a bill of revivor, if indeed the appellant could be allowed to bring one where nothing was decreed him; the renewal being denied, and the benefit of the account, if not barred by length of time, gone to the personal representative. And to admit him to unravel the former decree by original bill, and in consequence thereof, to enter into a second examination of the same matter, in order to supply the defects of former depositions, would be opening a door to perjury, and might produce a second decree upon the same case repugnant to the former, and tend to make the records of the court contradict one another. That the reason why judgments at law cannot be pleaded till enrolled, is, that being liens upon the land they must be enrolled, that all persons may see what lands they affect; but decrees in equity greatly differ, they do not bind lands, nor can purchasers be affected by them unless they are parties, and the only benefit accruing from an

enrolment, is to prevent a rehearing. That the pronouncing, and not the enrolment, constitutes the decree, and the decree binds from the day of pronouncing; the judgment taken down by the proper officer is conclusive, and the register's book, where the judicial acts of the court are entered, is the best evidence of the fact; the signing by the Chief Baron is only a certificate that the court gave such a judgment, and does not make it the judgment of the court: besides, it was not the duty of the defendant but of the plaintiff to enrol the decree, he being entitled to the benefit of the account, and after so long an acquiescence, by no means accounted for, objections of form only ought to have no weight." That the court allowed the plea in mercy to the appellant, as it was scarce denied to be good in substance; and it was apprehended, that the respondent would at all events be entitled upon the hearing, to read the entry of the minutes taken in the year 1723, and that the court would not then enter again into the merits of the case, but would consider them as having been finally determined at the hearing in 1723. That if there was any error in the order now appealed from, it rested in the declaration of the court, that the allowance of the plea was to be "without prejudice to such other method of proceeding as the plaintiff may be advised to take, to obtain the relief sought by his present bill;" a declaration unnecessary and ineffectual, as it did not give, any more than it took away any remedy which the appellant might have had; if the plea had been allowed generally; for the appellant had it in his power to amend his bill, and thereby vary his case as he should be advised; and if the respondent should plead the same matter over again, he might again amend his bill, (an experiment which the appellant had already several times tried in the course of this cause,) and so on till the court should restrain him from making any farther amendment.

After hearing counsel on this appeal, it was ordered and adjudged, that the order therein complained of should be reversed; and that the plea should stand for answer, with liberty to except, and the benefit thereof be saved to the hearing.—6 *Bro.* P. C. 73.

Observations on the Case of Charles v. *Rowley.*

Observations on the case of Charles v. Rowley.

THE lawyers for the plaintiff in *Baynham* v. *Guy's Hospital*, 3 *Ves. jun.* 297, expressed an opinion that this case, together with the two succeeding cases, namely, *Kane* v. *Hamilton*, and *Bateman* v. *Murray*, seemed to incline against the renewal of these leases: but Lord Redesdale in his notice of this case when giving judgment in *Lennon* v. *Napper*, does not give to it much weight of any description, and says, that the only question in this case was whether the dismissal in 1723, operated as a bar. It may however be observed that it is a link in the chain of cases, and that as in respect to the three preceding cases, the judgments of the court in Ireland were uniformly affirmed, so in respect to the next three cases, namely, *Vipont Charles* v. *Rowley*, 1774, *Kane* v. *Hamilton*, 1776, and *Bateman* v. *Murray*, 1779; the decisions of the court in Ireland was in each case reversed by the House of Lords in England, and the consequence was, the enactment of the tenantry act in 1780, resulting directly from the reversal of *Bateman* v. *Murray*, and by which the local equity of Ireland was revived. This local equity is recognized, and this branch of peculiar Irish law distinguished in the English case last mentioned by the Master of the Rolls in England in 1796; at which period that office was filled by Sir Pepper Arden.

Opinion of Sir P. Arden on Irish renewals.

Master of the Rolls.—" I shall lay the Irish cases * out of the question. They went upon what Lord Lifford calls a local equity. They had gone on upon the idea, that a renewal might be claimed at any distance of time. Lord Thurlow, upon the appeal to the House of Lords in *Bateman* v. *Murray*, disavowed that; and said, he could not, sitting here, administer an equity which did not arise upon the case; and the decree made in Ireland was reversed; upon which an act of Parliament was procured in Ireland to put an end to it. You will see a very elaborate judgment of Lord Lifford's in *Vernon* and *Scriven's* Reports, 135, 136."

It seems to the Editor quite clear that the Master of the Rolls in *Baynham* v. *Guy's Hospital*, recognized an equity peculiar to Ireland in respeet to the doctrine of Renewals; because, that was a case on English renewals,

* The Irish cases which were cited to the Master of the Rolls in *Baynham* v. *Guy's Hospital*, were, *Charles* v. *Rowley*, *Kane* v. *Hamilton*, and *Bateman* v. *Murray*.

and in which the right of renewal was forfeited by the laches of the tenant: and in a case of that description the Master of the Rolls commenced his judgment by stating that he would "lay the Irish cases out of the question;" meaning thereby, as the Editor presumes, not only the Irish cases that had been cited, but the Irish cases generally, which his honour seems to have considered more extensively than those cited at the bar, and upon the general view of the entire, to have rejected them altogether, from any application to the *English* case of renewal then before him.

The succeeding observations of the Master of the Rolls on the subject, appear to the Editor as reasons assigned by him for such exclusion of the Irish cases from such English cases as he then was considering: that is, that the law respecting renewals in Ireland was distinct from the law respecting renewals in England; and chief among these reasons, is this prominent one; that "the Irish cases had gone upon the idea, that a renewal might be claimed at any distance of time;" an opinion which the Master of the Rolls alleges to have been disavowed by Lord Thurlow on the appeal to the Lords in *Bateman* v. *Murray;* his Honor further stating that Lord Thurlow had then declared that "he could not, sitting there, administer an equity that did not arise upon the case:" and his Honour adding that "the decree made in Ireland was reversed; upon which an act of parliament was procured in Ireland to put an end to it." A question here arises to put an end, to what? Doubtless to put an end to this difference of opinion between those high tribunals on this important subject; and to revive by the statute the ancient equity of Ireland, which this reversal by Lord Thurlow would otherwise have (to adopt a parliamentary expression) repealed. *Sed vide* the opinion of Lord Redesdale on this subject in his judgment on the case of *Lennon* v. *Napper;* who expresses an opinion that in the case of *Murray* v. *Bateman* he would have, like Lord Thurlow, refused a renewal if the same case had come before him, as Lord Chancellor of Ireland, even after the tenantry act; because he declared it a case of fraud.

It may however be here observed, that the question which agitated Ireland immediately after the reversal of the decree of Lord Lifford in *Bateman* v. *Murray*, by the English House of Lords, was the reason which was then considered to have produced that reversal, and not any other reason, which a subsequent and perhaps more informed

and certainly more inquiring Chancellor might thereafter have discovered to justify that reversal. It may further be observed, that Sir Pepper Arden, who seems to speak on the case of *Bateman* v. *Murray*, as if from professional experience or inquiry, and who certainly speaks of it as if he were informed upon it, on grounds extrinsic to any thing that can be collected from the report of the case, treats the judgment of Lord Thurlow as a distinct difference of opinion between him and the Irish Chancellor, Lord Lifford, in which the latter had expressed an opinion, that "a renewal might *in Ireland* be claimed at any distance of time," and in which Lord Thurlow had disavowed that opinion: Sir Pepper Arden further adding, that "the tanantry act had been enacted to restore the law," as stated by Lord Lifford, which the judgment of Lord Thurlow had overruled.

It may be proper also to remark that Sir Pepper Arden, in this judgment, never notices any of the opinions of Lord Mansfield, in the case of *Kane* v. *Hamilton*; and the Editor takes leave here to remark, that this omission is the more remarkable, because the case of *Kane* v. *Hamilton* had been pressed on his attention from the bar: and the silence of the Master of the Rolls in this case respecting the opinions imputed to Lord Mansfield in *Kane* v. *Hamilton*, contribute to sustain the opinion expressed by Lord Redesdale, and entertained by all well informed lawyers, that the judgment imputed to Lord Mansfield in *Kane* v. *Hamilton*, is a gross mistake in the report of the judgment.

More observations on this subject will more properly belong to the succeeding case.

This case of *Vipont Charles* v. *Rowley*, is the last case on the subject of these Irish renewals to be found in Brown's Par. Cas. or the continuation thereof.

The next case is that of

Kane v. *Hamilton*, 1776.

A decree by the Exchequer in Ireland for a renewal reversed.

On the 10th of December, 1768, Nicholas Hamilton filed a bill in the Exchequer in Ireland, stating, that by articles 4th October, 1734, James Hamilton demised to Gustavus Hamilton, plaintiff's father, the lands of Killyslaven, in the county of Monaghan, together with the mill and water courses, for the lives of Gustavus, and his two eldest sons, Nicholas and George, at the yearly rent of £28.

Lord Mansfield was of opinion

It was agreed that leases should be perfected at the request of either party, containing a covenant of re-entry and dis-

that it was necessary to renew in due time, and before the day appointed in the agreement elapsed.

tress, as also *a covenant of renewal for ever, paying half a year's rent as a fine in six months after the fall of every life* then named or thereafter to be named. Other articles were at the same time executed of other lands to the same purport, at £18 yearly rent, and Gustavus entered into possession. That Nathaniel Kane, the father of defendant Joseph, being mortgagee of the lands under James Hamilton, applied to Gustavus to attorn to him, which was done after a long negociation between them concerning an abatement of the rent from £46 to £36. The whole proceedings concerning this abatement are set out in the pleadings to shew that Nathaniel Kane had notice of the articles, and ratified them by these acts. Gustavus continued in possession at £36 rent till about 1742, when one of the *cestui que vies* died, and application was made to Kane for a renewal, which he declined, being only mortgagee, and the matter was therefore postponed. In August, 1755, Gustavus died in England, intestate, leaving the plaintiff his eldest son and heir. In February, 1757, Nathaniel Kane died, leaving defendant Joseph his eldest son and heir, who, as stated by the bill, purchased the equity of redemption in the lands, and became absolute owner. That plaintiff was ignorant of the articles, or their contents, until 1763, when he applied for a renewal of the two lives, and an account of the rents which Kane had received in payment of his arrear. This was declined after various negociations; and the bill was at length filed, offering to pay the fines of renewal for the two lives with interest, and praying that Joseph Kane should account for the rents and profits by him received since his father's death, that plaintiff might be restored to the possession of the premises, aud defendant compelled to execute leases thereof at the yearly rent of £36, according to the articles, and award which had been made.

Joseph Kane, in his answer stated, that the premises had been mortgaged to his father, 16th May, 1727; that the equity of redemption was conveyed by lease and release 29th and 30th January, 1729, which were registered the next day, and that as the articles were executed subsequent to that conveyance, and his father not being a party to them, defendant was not bound by them, and insisted upon the benefit of those deeds as if he had pleaded them. That Gustavus Hamilton had been considered as tenant at will merely. *Denied that any application had been made to Nathaniel Kane for a renewal.* That Gustavus had actually surrendered the premises, and insisted he was not bound to execute

any renewal of the articles or lease, or to account for the profits, and the rather as plaintiff had lain by so long, and till the death of all the persons who could give a circumstantial account of the proceedings between the parties.

There were a great number of bills of revivor, a cross bill, &c. in the cause, so that it was not finally heard until the 17th April, 1774, and on the 5th day of May in that year the court decreed, that plaintiff was entitled to a lease for three lives, at £36 yearly rent, and half a year's rent fine on the fall of each life: and it was referred to the officer to state an account as to the rents, issues, and profits received, or that might have been received by Nathaniel Kane or his agent from 1st November, 1752, to the death of N. Kane, and also of what was received by defendant, and also to state an account of what was due for renewal fines and interest for the same, since the deaths of Gustavus and his son George, the officer to compute a fine for every seven years, to commence from the end of six months next after the fall of each life, and dismissed the cross bill.

E. Thurlow.
J. Dunning.
C. Fearne.

Mr. Kane conceiving himself aggrieved by this decree, and that it was erroneous, appealed to the Lords of Great Britain, before whom it was contended, that the conveyance of 1729 was an absolute conveyance, and registered as such. That the articles of October, 1734, were a nullity as to appellant, and could create no lien upon the lands, because James Hamilton had then no estate nor interest therein, upon which those articles could operate. He was nothing more than tenant at will to Nathaniel Kane. Gustavus Hamilton could not acquire any better title from him, and accordingly it appears he was considered as nothing more than a tenant at will. That appellant was unacquainted with the subsequent conveyance of the equity of redemption stated in the bill. That the surrender by Gustavus Hamilton put an end to the operation of the articles, and every ground of title under them. But it is objected, that though there was a surrender of the possession in 1752, yet there was no surrender of the leases agreed for by the articles. That the statute of frauds requires, that the surrender of those leases should have been by writing: but no written surrender is produced. To that it is answered, that though the written surrender of 1752 not having come to the hands of the appellant, he has therefore not been able to produce it, yet the surrendering of the possession of the lands by Gustavus, and his not having applied for any renewal during his life, notwithstanding he lived fourteen years after the first life named in the article

dropped, the acts of ownership exercised by Nicholas Kane's agent afford strong ground to believe there was in fact a surrender. That if respondent could be entitled to any lease at all, it ought to be subject to a rent of £46 and not £36. And lastly, that respondent's conduct in lying by till the death of witnesses capable of giving a satisfactory account of the surrender, the unjust advantage then attempted to be taken, by setting up a dormant claim to the lands which respondent's father had relinquished the possession of twenty years before, and had ever since the year 1752 permitted the appellant's father peaceably to enjoy and exercise every act of absolute ownership over; and the motive which induced him to set up this claim, namely, the accidental rise of land in Ireland, are surely circumstances which do not entitle it to favour in a court of Equity.

A. Wedderbourne.
A. Forrester.

For the respondent it was said, that the appeal ought to be dismissed, for that leases for lives with covenants for perpetual renewals, like the present, are very common in Ireland, a great deal of property being held under them; and though it frequently happens that the lessees do not, upon the dropping of every life, fill up their lease with a new nomination, as they strictly ought, and pay the stipulated fine, yet it has been the constant practice of the courts in Ireland to admit the lessees at any time after, during the continuance of any one of the lives in the lease, to fill up such vacancy, upon paying the stipulated fine, with interest from the time it ought to have been paid; and as a farther compensation for the chance that such new life (had it been named at the time it ought) might have dropped before the actual renewal took place, it has been usual to subject the lessee to pay a new fine at the end of every seven years during the continuance of such vacancy, as is decreed in the present case, whereby the lessor receives a full recompense for the lessee's default. This practice has received the sanction of this house in various instances. Secondly, the respondent's right under the articles 4th October, 1734, is no way affected by the appellant's mortgage, though prior thereto in point of time, the money then lent on mortgage not amounting to half the value of the estate comprised therein, as appears by the subsequent transactions between the parties. The mortgagor continues in possession of the mortgaged lands several years after the mortgage made, and was so at the time of his making the articles, acting as visible owner of the estate;

and when the appellant's father, the mortgagee, came to take possession of the mortgaged lands, he not only found the respondent in possession of the premises in question, by virtue of the articles, but accepted him as tenant thereof under them, and abated him £10 a year in the rent, as appears by the award made, and by his letters to respondent's father, and to his own agents, and the rent so received was for several years after accepted and received by him, as appears by the several accounts passed between them, till within a few years of the respondent's father's decease, when the actual possession of the premises was lost only by the respondent's father's intrusting the appellant's agents (as fully appears from their accounts) with the receipt of the rents and profits thereof from the under-tenants, in order to discharge some arrear of rent incurred and become due from him to the appellant's father; but neither these few years during which the respondent's father was out of possession at the close of his life, nor the period that afterwards elapsed before the respondent asserted his right, can be a bar to him, as he was ignorant of that right till a short time before he filed his bill; besides as being one of the original lives in the articles of 4th October, 1734, he is clearly entitled to a renewal upon the principles before mentioned.

Lord Mansfield said, supposing the other point respecting the mortgage and possession out of the case, another question would arise, viz. whether the respondent would be entitled to a new lease under the covenant in the articles for a perpetual renewal: the terms are, *that leases should be perfected containing a covenant for renewal for ever, paying half a year's rent in six months after the fall of every life, then, or thereafter to be made.*

It appears that a life named in those articles died in 1741, and another in 1755, and that no step was taken to get a renewal till the year 1763. Now it has been said to be the established practice of the courts in Ireland, and to have been confirmed here, that though the lessees in these leases, upon the death of a life neglect to renew, and pay the fine within the day limited, yet that any time after, during the continuance of any one of the lives, they are entitled to a renewal upon payment of a new fine at the end of every seven years during the vacancy. I always thought that people were bound to the performance of their agreements, and if a man covenants to renew within six months after the fall of every life, surely the court cannot

make a new agreement for him. But it is said to be the established law in Ireland, and confirmed here. Now I will state some of the cases relied on in support of this doctrine, and your Lordships will be astonished at the difference between those and the present case.

The case of *Anderson* v. *Sweet*, which came before the House of Lords in 1722, was a case under peculiar circumstances; it was not known whether the *cestui que vie* had been dead or not. The case of *Lord Ross* v. *Worsop*, which came before the Lords in 1740, was also under peculiar circumstances, the landlord having been absent from Ireland, and upon his return having consented to renew. These cases, therefore, turning upon their peculiar circumstances, did not establish any general rule as contended by the respondent, and this is proved by the case of *Pendred* v. *Griffith*, in 1744, where the decree was founded on the lapse and omission to renew within the time limited.*

Upon this point, therefore, I am of opinion, it is necessary that on the falling of a life, another should be inserted in due time, and before the day for renewing is elapsed. The court cannot destroy the agreement of the parties: it is expressly stipulated that a renewal should be granted upon the condition of the lessee's paying a fine of half a year's rent in six months after the fall of every life. Two lives died, and no fine was offered, or renewal applied for until long after the expiration of the six months. Here, therefore, is no foundation for relief; for this is not like the case of a penalty. It is the most material and essential part of the agreement, that the renewal be within the six months, and it was intended to be strictly complied with, because the landlord has the chance of a fine by the *cestui que vie*, and to dispense with the lapse and neglect in not naming a new life, deprives the landlord of the chance of a fine, and renders the agreement of no effect: a court of Equity cannot give a compensation for the damage which may be sustained, it being merely eventual aud uncertain.

**Query.* Was not the fraud of the tenant in concealing the death of the *cestui que vie* a much stronger foundation for refusing a renewal? *Ridg.*

Besides, in these articles there is not an equal obligation to renew on each of the parties. The landlord covenants for perpetual renewal on the death of the lives and payment of the fines; but there is no covenant on the part of the tenant. He is left by the articles to his choice to renew or not. In this respect, therefore, they are inequitable, and the lessor has no remedy if he is deprived of his legal advantage arising by the lapse.

Upon the whole I think that the court cannot dispense

with the lessee's neglect in not renewing according to the covenant. I do not mean to lay it down, that there may not be a case (as where the omission to renew within the time limited proceeds from circumstances like those in the cases cited, *and was unavoidable*) in which the court would not give relief; but that the neglecting to offer a new life within the time stipulated by the lease is fatal, unless there are very equitable reasons indeed.

Those sort of cases are not such as deserve support in a court of Equity. They should be discountenanced as much as possible. They are extremely pernicious and oppressive, and a subject of general complaint to the gentlemen of Ireland; and *I am astonished at the indulgence said to be shown in those cases in the courts of Ireland.* But whatever courts might do upon the particular circumstances of other cases, yet this is a case of such singular circumstances of unfairness on the part of the respondent, that there is not the least pretension for relief. I am therefore of opinion, and move, that the decree should be reversed, and the respondent's bill be dismissed.

Decree reversed.

The decree of the Exchequer for a renewal was accordingly reversed. 1 *Ridg.* P. C. 180.

Observations on the Case of Kane v. *Hamilton.*

Observations on the case of Kane *v.* Hamilton.

The case of *Kane* v. *Hamilton* is remarkable, as being a case of great negative importance, and highly important notwithstanding; because it contains a chief portion, if not the entire portion, of all that doctrine respecting renewals in Ireland, which has been subsequently overruled: and these doctrines, so exploded, expressed with that attractive simplicity of language so customary with Lord Mansfield, and so capable of giving currency at first view to the mistaken opinions of that eminent judge. The Editor, in suggesting these opinions, does not presume to give any of his own; but he is authorized, from the mere circumstance of inquiry, to say, that if the opinions attributed to Lord Mansfield in this case were expressed by him, (and there is much reason to believe that they were), they have been entirely discountenanced by all experienced barristers, whose attention have been since directed to this case; and what is of infinitely more importance, they have been distinctly, and "*upon the point*," overruled by the course of all subsequent equity decisions, but more particularly by the influential and most direct judgment of Lord Redesdale.

Lord Mansfield was not an Equity judge, although remarkable as being addicted to the adoption of equity principles *in a court of law*: he sat in a court of law *exclusively*; he was the Chief Justice of the King's Bench: had he been the Chief Baron of the Exchequer, he would have been the chief of a court engaged alternately in law and equity; and his introduction of the principle peculiar to the one jurisdiction, into those conducted under the other, might have been the more intelligible, although certainly not the more unobjectionable for that reason: but the judicial reasons of Lord Mansfield were not so mixed; he never sat in an Equity court, except when, in common with every other peer, he took the opportunity of exercising an opinion on the case of an appeal in the House of Lords. In that character alone, he appears in the case of *Kane* v. *Hamilton*: in most other cases, as a judicial man, he was the judge of a court of law exclusively. As the Chief Justice of the King's Bench he has been blamed for admitting therein certain principles of equity; and blamed, with reason; because the principles applicable to a court where the defendent is required on his oath, and under the penalties of perjury, to be a witness against himself, never can be applicable to the variant proceedings of a different jurisdiction, where neither the plaintiff nor defendant can be sworn or be heard, and where one witness can decide the case for the plaintiff; whereas, in equity, more evidence than one witness is necessary.

Lord Mansfield blameable for the introduction of equity principles into a court of law; and in this case of law principles into a court of equity.

Therefore Lord Mansfield has been, not without reason, blamed, and has been blamed by high judicial authority for the introduction of principles *peculiar* to equity, into the proceedings of a court of *law*. But the objection imputable to Lord Mansfield respecting his judgment in *Kane* v. *Hamilton*, if that judgment be fairly imputable to him, is of an opposite, though not less objectionable character; it is not that he introduced principles peculiar to *equity* into the proceedings of a court of law; but it is that he introduced principles peculiar to *law* into the proceedings of a court of *equity*.

Lord Redesdale has expressed an opinion, grounded on his inquiry and experience, that every case of an Irish renewal has produced an equity suit, on an average of every forty years, in respect to every lease under this tenure. The Editor hopes that this collection of the law on this subject, which has been previously so much dispersed, and at such indefinite intervals, through heavy and expensive law pub-

lications, some peculiar to England, and others to Ireland, may enable a landlord or tenant, or the agent of either, to ascertain on a review of this collection of the cases, how far the landlord should be bound to accept the fines tendered, or the tenant to file his bill for a renewal. For the purpose of levelling this subject in a greater degree to the general understanding, and thus avoiding a recurrence to that habitual litigation mentioned by Lord Redesdale as so usual in Ireland, the Editor shall endeavour to supply some authorities explanatory of the general bearing of the law to a mind not professional, or to a student inexperienced on this subject. For this purpose he shall next subjoin the most simplified distinction in respect to this tenure, with which his inquiry has supplied him from the writers most informed on this subject, and with this view he shall first lay down the following principle from Lord Redesdale as introductory of a simplified view respecting the law on this case, extracted from the letters of Mr. Sugden respecting estates, &c.

Application as to these renewals to the court is for a specific performance of a covenant to make an estate of land.

The application to the court in such cases (meaning renewal cases in Ireland) is to compel a specific performance of a covenant to make an estate of land: this is a good ground for an application to a court of Equity, upon which it daily exercises jurisdiction; and specific performance ought to be decreed, unless there are particular circumstances which ought to exclude the party from relief.—2 *Scho. and Lef.* 682.

This subject will become the more intelligible from the following explanation, given by Mr. Sugden, of the difference between law and equity in cases considered by Lord Redesdale as analagous to the present matter; that is, as to a specific performance of a covenant to make an estate of land.

The administration of law and equity by different modes, and in different courts, peculiar to the constitution of these countries.

"It is peculiar to the constitution of this country, that the law on the same case is frequently administered differently by different courts; and that not from a contrary exposition of the *same* rules. It must sound oddly to a foreigner, that on one side of Westminster Hall a man shall recover an estate without argument, on account of the clearness of his title; and that on the other side of the Hall his adversary shall, with equal facility, recover back the estate. In all other countries the law is tempered with equity, and the same grounds rule the same case in all the courts of justice. The division of our law into what is termed legal and equitable, arose partly from necessity, and partly from

the desire of the ecclesiastics of former times to usurp a control over the common law courts. Our legal judges heretofore adhered so strictly to technical rules, although frequently subversive of substantial justice, that the Chancellor interfered, and moderated the rigor of the law according, as it is termed, to equity and good conscience. The judges in equity soon found it necessary, like the common law judges, to adhere to the decisions of their predecessors; whence it has inevitably happened, that there are settled and inviolable rules of equity, which require to be moderated by the rules of good conscience, as much as ever the most rigorous and inflexible rule of law did before the Chancellors interposed on equitable grounds. However, as the law of property is now administered in the different forums, allowing for the imperfection of all human laws, it exhibits a most splendid and comprehensive code of jurisprudence; and the man will deserve ill of his country who shall ever attempt to confound the rules by which the courts of law and equity are severally guided."—*Sugd. 2 Lett. p. 3.*

The decisions of Lord Mansfield on real property concurred in for nine years by the court of King's Bench,

Sir John Burrow, the reporter of Lord Mansfield, in his preface to his Reports, *p.* 3, says, "that there never was more business, that the reasoning and opinion of the judges never gave more satisfaction; that *all* the seats were never so filled together, and that since the 11th day of November, 1756, to this day, (which happened to be nine years after,) there never has appeared in court the least difference of opinion. And that every rule, order, certificate, and judgment, have been unanimous." Sir John, with a simplicity that could scarcely be expected from him, and in a blindness to the sarcasm which he is throwing on his court, adds that "this never happened before." And as the Editor concurs with Sir John in thinking that such a circumstance never had a precedent in any of our high courts of jurisprudence, he humbly expresses his sincere hope, that it may never have an imitation. For although Mansfield was one of the most enlightened judges that ever adorned the English bench, and the creator of our commercial code; and although Buller was one of the ablest lawyers that ever laboured at the English Bar, yet Buller was consessor with Mansfield during the long period of this accidental coincidence, in this extraordinary and unaccountable unanimity. An unanimity during which the landmarks of the law of real property received a severe shock, and an unanimity which sanctioned principles in our laws, that the ablest and wisest of Lord Mansfield's

successors have felt it their difficulty and their duty to subvert or explain away.

The main part in the last mentioned remarks were suggested to the Editor, as they are also sustained by the following observations of Mr. Sugden.

and the most of them overruled by his successors.

"Lord Mansfield was unhappily too prone to administer equity in a court of law. The landmarks of the law of real property received a severe shock in his time; and it is painful to reflect, that although his successors have now nearly subverted the principles of every important decision pronounced by him on the law of property, yet during the period he was Chief Justice of England, there was scarcely a difference of opinion on the bench where he presided, so implicitly were his equitable principles adopted."—*Sugd. Let. 2. p. 5.*

The following position of Lord Chancellor Eldon is explanatory of this great error of Lord Mansfield and Judge Buller; namely, of considering the rules of property as equally applicable in a court of law or equity.

A rule of property in equity is not therefore to be adopted at law; the courts in some respects proceeding upon different principles: courts of equity for instance, not allowing a single witness, unless supported by circumstances to prevail against a positive denial by the answer.

"With regard to the second proposition of Mr. Justice Buller, that "if this had become a rule of property in equity, therefore it ought to be adopted in a court of law;" with great deference to the learning and memory of that judge, that appears to me a very hasty proposition; and the converse undoubtedly will not hold: for it is impossible for this court, upon the principles upon which it acts, to say, that whatever is a rule of proceeding at law is of course a rule of proceeding in equity. It may be asserted that it should be the case; but it is impossible it can. For instance, in the case of the mortgagee, put in *Pasley* v. *Freeman*, if the man makes a false declaration, and an action can be maintained upon that, and the principle upon which it can be maintained, is, that a court of Equity will relieve, the converse ought to hold; that, where an action can be maintained, equity should give relief. But is that so? A defendant in the court has the protection arising from his own conscience in a degree, in which the law does not affect to give him protection. If he positively, plainly, and precisely, denies the assertion, and one witness only proves it as positively, clearly, and precisely, as it is denied, and there is no circumstance attaching credit to the assertion overbalancing the credit due to the denial, as a positive denial, a court of Equity will not act upon the testimony of that witness. Not so at law. There the defendant is not heard. One witness proves the case; and however strongly

the defendant may be inclined to deny it upon oath, there must be a recovery against him. It seems to me rather surprising, if I may presume to say so, that Lord Mansfield, who concurred with Mr. Justice Buller in a great many of these equitable principles in a court of law, should not have attended to these distinctions which perhaps will be found in the very principles upon which this court exists." By Lord Eldon in *Evans* v. *Bicknell*, 6 *Ves. Jun.* 184.

The reader will hold in view that a bill in equity filed by the tenant for a renewal on a lease of lives renewable for ever in Ireland, is an application to the court for a specific performance of a covenant to make an estate of land. It becomes therefore important to observe the essential difference between law and equity as it affects an application for a specific performance; more especially because it appears that this difference has been sometimes overlooked even by eminent legal authorities, and more particularly by Lord Mansfield, the validity of whose judgment in the case of *Kane* v. *Hamilton*, is at present the subject of inquiry; and who in that case the Editor submits entirely overlooked the distinction here referred to, not by introducing principles of equity (as was his more general error) into a court of law, but by introducing principles of strict law into the decision of a court of Equity. This essential difference to which Lord Eldon has referred, and of the neglect of which he complains, in respect to Lord Mansfield, is explained in the following extract from *Sugden:*

Difference between law and equity in respect to these contracts,

"The essential difference between law and equity, as it affects the subject upon which I am writing, consists in this, that equity will give you the thing itself for which you have contracted, whereas the law can only give you a pecuniary compensation for the dishonesty of the other party in not fulfilling his contract. Thus, if you were to sell your estate to your neighbour Thompson, and were afterwards, disliking the bargain, to refuse to convey it to him, he would have it in his election to proceed against you either at law or in equity. If he resolved to proceed at law, he would bring an action against you for the recovery of damages for breach of contract, and a jury would decide the amount of the damages which you ought to pay; but still you would retain the estate in the same manner as if you had never contracted to sell it. But if he wished to have the estate itself, he would file a bill in equity against you for what is termed a specific performance, or a performance *in specie*, and the court would not, like a court of law, in effect, let you off the contract on payment of

is, that equity gives the thing itself, but law gives damages for the breach of the contract.

damages, but would compel you to convey the estate itself to the purchaser upon his paying the purchase money to you. But of course, as the court compels you to *perform* the agreement, there are no damages to pay. This equity is founded upon the principle, that the court considers that as actually performed which is agreed to be done ; so that the instant after you have entered into a contract to sell an estate, the court considers the estate as belonging to the purchaser, and the purchase money as belonging to you, and *vice versa.—Sugd.* 2 *Lett. p.* 5.

Equity looks to the substance, but law to the letter.

But equity will not interfere in every case. A man acting without good faith cannot require the extraordinary aid of the court, but will be left to his remedy at law, where his bad conduct will have its full operation with a jury. Equity, also, looks to the substantial intention of the parties, whereas the courts of law adhere more strictly to the letter of the contract.—*Ib.* 7.

Observations on the judgment of Lord Mansfield.

All the reported cases which preceded *Kane* v. *Hamilton*, have been already collected by the Editor, and set forth in this Treatise previously to the last mentioned case in the order of their dates. It would seem to the Editor that most of the arguments which had been overruled in the preceding cases were collected and adopted by Lord Mansfield in his judgment on this case; indeed this judgment affords a condensation of all the exploded legal doctrine on the subject of Irish renewals, as used at different periods before the enactment of the tenantry act; and one objection to their validity may be applied to them all, namely that they are all principles of law applied to determine a matter in equity. For instance, Lord Mansfield is made to say, " I am of opinion it is necessary that on the falling of a life, another should be inserted in due time, and before the day for renewing is elapsed." This is a good principle in a court of Law; but a bad principle in a court oi Equity when applied to these cases; because equity regards the substance, not the letter of the contract; and because the circumstance of the time is in this case matter of *form* and not matter of *substance.* The promise of the lessor in a renewal lease in Ireland for lives renewable *for ever*, is, substantially to grant a *freehold for ever* : the promise of the lessee on his part of the agreement, is, that he will pay the rent and occasional fines; if he merely neglected the payment of those fines, it is a principle of equity, that by repairing that neglect, the parties should be put on the original footing, as if no such neglect had occurred; that

is, as if the lessee had paid his rent and fines; and if he had, no objection then remained why equity should not direct the lessor to fulfil *his* part of the agreement; that is, to grant to the lessee, so far as in him lay, the enjoyment of a freehold for ever; that is, to renew to the lessee. It was formerly objected that the neglect of the lessee did not admit of repair or compensation, because if the lives had been regularly added, these lives so added might also have dropped, and thus the lessor have been entitled to other fines; and therefore that a damage so eventual and uncertain could not be calculated, and for that reason did not admit of compensation. But Lord Mansfield was too young by half a century for the adoption of a principle which had been rejected so early as the oldest reported case on this subject, namely, the case of *Sweet* v. *Anderson*; in that case a mode of calculatiou to meet this contingency had been established, not only granting renewal fines with interest thereon for the lives that had dropped, but also granting septennial fines to compensate for the other supposable lives which should have been added, and might also have dropped, and which mode of compensation and calculation had not only been used in the courts in Ireland, but affirmed by the Lords in England. Therefore this last objection of Lord Mansfield is clearly answered by the case of *Sweet* v. *Anderson*. Nor is there more weight in another argument as to the supposed hardship of the covenant not being mutual; because the landlord has his remedy in equity, to compel the tenant to accept of a renewal or relinquish his claim to it. As to the criticism of Lord Mansfield in respect to the three first cases in this treatise, the inconclusiveness of his observations, is abundantly illustrated by Lord Redesdale in his judgment on *Lennon* v. *Napper;* who finds so much difficulty to deal with the judgment of Lord Mansfield that he is compelled to lean to the opinion that the reporter must have been mistaken. Mr. Ridgeway however, stated that he had strong reason to believe that the report was accurate. Much of these observations may also be applied to the substance and result of the case following. The next case is:

Bateman v. *Murray*, 1779.

Lord Thurlow held the rule respecting renewals to be, that courts of Equity will relieve the lessee, if he has lost his right by fraud in the lessor, or by accident on his own part, but will never assist him when he has lost his right by his own gross laches or neglect.

The bill in this case was filed in the court of Chancery in Ireland, 10th June, 1765, by Sophia Murray, widow and administratrix of George Murray, deceased, and William Murray, a minor, eldest son and heir of said George Murray, by the said Sophia, his mother, and next friend, against John Bateman, Esq. and Olivia Countess of Rosse, his wife and others, stating that Edward Edwards being seised in fee simple of the manor of Hastings, in the county of Tyrone, "having power to make leases thereof in fee-farm, or for any number of years or lives determinable or renewable," by indented deed, 28th October, 1685, did give, grant, enfeoff, and in farm let, unto Thomas M'Causland, all that the two towns of Claraghmore and Shegully, being part and parcel of said manor of Hastings, *for ever*, to hold unto the said Thomas M'Causland, his heirs and assigns in fee farm *for ever*, viz. for the life of said Thomas, and of Andrew and John, his two sons, and the longest liver of them, at the rent of £15, with two year old bullocks, and one fat mutton above taxes; said rent to be paid on 1st May, and 1st November, in which deed was contained the following covenant: "And it is agreed between the said parties, that at the death or decease of any of the lives above-mentioned, whensoever it shall please Almighty God to call, that then upon the payment of a fine, or sum of £7 10s. sterling, tendered and paid unto the said Edward Edwards, his heirs or assigns, *within three months next after such death, or decease*, he or they shall add another life instead thereof, by new deed indented unto the said Thomas M'Causland, his heirs or assigns, *continuing the lives for ever*, upon the payment of the said fine or sum of £7 10s. sterling, at the fall of every life as aforesaid." There were also covenants for warranty and further assurance; that the tenants would do suit and service at the courts leet and courts baron of the manor; a covenant of distress, with 12d. in the pound *nomine pœnæ*; not to alienate without license, and that the lessee, his heirs and assigns, should make appear at every Easter court leet, by two sufficient witnesses, duly sworn, that the said three lives were then alive and in being, and upon neglect, it should be lawful for lessor, his heirs and assigns, to distrain for the fine of £7 10s. In 1708, the original indenture, and the lands thereby granted, having by divers mesne as-

signments become vested in James Murray, (father of George Murray, and grandfather of the plaintiff William,) and it being doubtful whether two of the lives named in the deed had not fallen, James Murray applied for a renewal, and by indenture, 16th November, 1708, reciting at large the original indenture of 28th October, 1685, and the several mesne assignments thereof, and that Andrew and John M'Causland (two of the *cestui que vies*) were gone abroad, and supposed to be dead, in consideration of two fines, the said original indenture was confirmed for the further lives of James Murray, and George, his son. In 1737, Hugh Edwards, to whom the reversion of the lands had descended, made his will, conveying to trustees, for the use of Olivia, his eldest daughter, for life, remainder in tail male, remainder over, and afterwards died, leaving the defendant Olivia, a minor, then about eight years old, who became seised under the will, and the trustees appointed Ann, the widow of John Edwards, (afterwards Ann Mervyn,) receiver of the rents, during the minority. In 1748 a treaty of marriage was concluded and the marriage solemnized between the said George Murray and plaintiff Sophia, previous to which articles of agreement, 26th July, 1748, were executed, whereby in consideration of said marriage and a marriage portion, George Murray covenanted to limit the lands in strict settlement, subject to £50 a year jointure to Sophia, and deeds of settlement were accordingly executed. Defendant Olivia attained age in 1751, and in February, 1754, was married to Richard, late Earl of Rosse, and in 1756 the lands were settled upon the Countess for her separate maintenance, under which title she enjoyed the rents until the death of the Earl in 1764, when she became seised under her father's will. Ann Mervyn employed George Murray as agent, during the minority of the Countess, after whose marriage, accounts were settled, in which the Earl and Lady Rosse had credit for all rent of the premises in question: after which George Murray was continued receiver till 1756, and accounted for the rent till his death. Thomas M'Causland, one of the *cestui que vies* in the renewal, 1708, died in 1741; James Murray, another, died in 1746; and George Murray, the remaining one, died in 1763, intestate, leaving Sophia his widow, and William his eldest son, who became seised under the marriage settlement, subject to the jointure: the Countess of Rosse continued to reside in England till the latter end of 1763, or beginning of 1764,

and soon after her return to Ireland, deeds of renewal were proposed and sent to her, with a sum of money sufficient for all fines with interest, and an account was sent giving credit for all such fines and interest; but no notice was taken thereof; and in Easter term 1765, Lady Rosse brought an ejectment for recovery of the premises in question, and in June following the bill was filed, praying that Lady Rosse might be compelled to execute a new lease of the premises in question, pursuant to the covenant for renewal, and that she might be restrained in the mean time from proceeding in the ejectment.

Lady Rosse in her answer admitted the indenture 1685, and the renewal, 1708; believed that the articles, if any, upon the marriage of George Murray, were after marriage, therefore voluntary and without consideration, and therefore the plaintiff was not a purchaser; that by articles of agreement on 21st October, 1730, James and George Murray absolutely sold and conveyed, or agreed absolutely to sell and convey the lands to Hugh Edwards, and his heirs, in consideration of £700; but that some claim having been set up by one M'Causland, James Murray and his family were permitted to contiuue in possession until the disputes and accounts were adjusted, and the rents were to go in discharge of part of the purchase money: that in 1731, the possession was delivered up to Hugh Edwards, who out of regard to James Murray, permitted him to continue in possession of part of the dwelling-house, and took George Murray into the family, as house steward, who by that means gained access to the papers, and took away the account and vouchers of the purchase money: that she was ignorant of this agreement for a sale until 1754, when the accounts were settled upon her marriage, and in the releases then executed, there was a proviso that nothing therein contained should extend to prejudice her title to the lands.

Issue being joined, witnesses were examined, and the defendant, Lady Rosse, having afterwards intermarried with John Bateman, Esq., he was made party to the suit, and the cause came on to be heard before the Lord Chancellor, 20th July, 1772, when his Lordship ordered the following issues to be tried in a feigned action by a special jury of the county of Tyrone: "Whether any and what agreement was entered into by the said James or George Murray with the said Hugh Edwards for a sale of their interest in the said lands, and of the said lease thereof; and in

case there was any agreement, whether the same was carried into execution, or whether the same was varied or departed from by the parties thereto, or either of them?"

The issues were tried in 1775, when the Jury found, "That there was no agreement entered into by the said James or George Murray, or either of them, with said Hugh Edwards, for a sale of their interest in the lands in question, or of the said lease thereof:" the defendant applied to set aside this verdict, which the chancellor refused.

The cause was heard on the judge's certificate and merits, in November, 1776 and 1777.

Kelly, M'Mollen, Davis, Boyd, and Crookshank, for the plaintiff. Leases of this kind have been considered as perpetual interests, and are sold and conveyed as such: they were introduced about the time of the revolution to procure responsible tenants, by giving them permanent interests, which have since been considered as inheritances. In *Furnival* v. *Crew*. 2 *Atk*. 83, a bill was filed by the tenants to compel a renewal, which was decreed, and it does not appear that the lapses were accounted for; this covenant is to be considered according to the custom of this kingdom, where they are considered as renewable notwithstanding the strongest negative covenant: but in the present case there is no negative covenant, not even for a re-entry. In *Harrison* v. *Sir Thomas Prendergast*, 16th May, 1754, a bill was filed in the Exchequer for a renewal: all the lives were gone, no application had been made for a renewal, and though the lease contained a negative covenant, a renewal was decreed; septennial fines were decreed on the supposed fall of the lives, which shews there must have been a lapse of fourteen years at least, and the lapse was not accounted for. In *Kirkwood* v. *Lord Tyrone*, a renewal was decreed after a recovery in ejectment. But independent of these authorities, the plaintiffs are entitled to a renewal under the circumstances of the present case; the words of the deed pass a fee-farm; the tenant covenants to prove the existence of the *cestui que vies* at every court leet, or the lessor shall be entitled to a fine for which he reserves a power to distrain, and what shews the intention of the parties that this lease should endure for ever, the rent is reserved not during the continuance of the lease, but *for ever:* so that if even all the lives were dead, the landlord might maintain an action of debt for the rent under the *reddendum*, which is for ever. There is no covenant to surrender, or keep the premises in repair: there is no covenant by the tenant to pay the fines, and therefore there

is no breach. The neglect of applying for a renewal is fully accounted for by the residence of the defendant in England, and there was no necessity to apply until the death of the last life, for the covenant is to renew upon the death of *any* of the lives, and the tender of the fines became nugatory from the defence set up, that plaintiff's ancestors had sold their interest, which defence is falsified by the finding of the jury. The arguments for the defendants tend to reverse the office of a court of Equity; they want to create a forfeiture, where, even if there was one, equity would relieve against it. Though the tenant broke all the covenants in his lease, it is no ground for forfeiture; before the statute which gives an ejectment for non-payment of rent, though there was no rent paid for forty years, the tenant did not forfeit his interest. And since the legislature has given remedy by ejectment for non-payment of rent, the tenant is allowed six months to redeem, and why refuse relief in the case of a fine where it is given for rent, particularly where the landlord has compensation by interest? 1 *Vern.* 83. Equity relieves against breaches of a condition where compensation can be made. There are a great number of cases in the courts here similar to the present. *Carpenter* v. *Stewart*, 15th February, 1733, in the Exchequer; there was a negative covenant, that unless the renewal was executed in six months, the lease should be void; the renewal was not demanded within the time, and yet there was a decree for the tenant. *Wood* v. *Lord Rosse*, was determined on the general principle of compensation. *O'Hara* v. *Bourke*, in the Exchequer, Hil. 1756, there was a negative covenant, that unless the fines and rent were paid within a limited time, the landlord might ever after deny a renewal; the first life dropped in 1721, the second in 1743, the third in 1748; an ejectment was brought by the landlord, and no renewal fine was offered but by the bill, which was not filed until 1751; Lord Chief Baron Bowes said that since the case of *Anderson* v. *Sweet*, these leases were entitled to be renewed upon the usual terms of paying septennial fines. *Shore v. Darnley*, in the Exchequer, 1766, the bill in that case was filed in 1764, when two of the lives were dead; one of them was supposed to have died thirty years before the bill was filed, and there was a covenant, that unless the fine was paid, and a life named within six months, the covenant should be void; in the bill there was not the least excuse given for the laches, and yet there was a decree for renewal on pay-

ment of fines from 1734, when the last account was had of the life, which was presumed to have been dead from that time, as appears by the fines given. Supposing this doctrine not to have been well founded, yet after such a length of time since 1720, it was not now to be shaken. Purchasers have been buying for a number of years under the sanction of these authorities, and to shake them will create a general confusion. The defendants in this case have been guilty of a fraud in setting up a title to deprive the tenants of their right of renewal. And as to the supposed hardship of the covenant not being mutual, the landlord has his remedy in equity, to compel the tenant to accept of a renewal, or relinquish his claim to it.

Prime Serjeant, Dennis, the Provost (Hutchinson,) and Yelverton for the defendants. The lives in this case are all dead, and the bill was not filed until two years after the death of the last, therefore the legal estate was at that time entirely gone, and no compensation is offered for the chance of fines which the landlord might have been entitled to, had new lives been named in due time: George Murray was under no incapacity of renewing, yet he never named a life within the three months pursuant to the covenant, and in all the cases where renewals have been granted after the expiration of the time stated in the covenant, there was some incapacity in the tenant; a court of Equity will only relieve against *accidents*, and not against wilful default. *Anderson* v. *Sweet* before the lords, in 1723, is the first case, but the rule has been changed since that time: the value of lands was then certain, and compensation could be made; the value is now fluctuating, and therefore though formerly the tenant might be decreed to a renewal at any time after the fall of the lives, yet a different rule has been since adopted, and the tenant must adhere to the covenant or account for the lapse of time. *Vipont* v. *Rowley*; the lease was in 1697, for three lives by Sir Anthony Lyster to one A. C. under whom the plaintiff derived; there was a covenant that if the tenant within one year paid a fine of £100, and tendered deeds of renewal, the lessor should renew: A. C. the first life died in 1710, the fine became payable in March, 1711, but no fine or lease was tendered until Jan. 1719, and in a month after a bill was filed: in 1723, the cause was heard, and the bill was dismissed, because of the *laches*. From 1711 to 1719 no excuse was made for the *laches*; the last life did not die until after the suit was instituted. In England leases of this kind are construed

strictly. 3 *Atk.* 83, *Furnival* v. *Crew.* 2 *Atk.* 44, *Dean and Chapter of Ely* v. *Stewart. Ponsonby* v. *Adams*, before the lords a few years ago. *Rolfe* v. *Peterson*, a covenant in a lease, that if any part of the ancient meadow, pasture, or furze ground should be ploughed up, or converted into tillage, the lessee was to pay £5 additional rent for every acre so ploughed up; an action was brought upon this covenant, and damages assessed; the tenant filed a bill to be relieved against this penalty, inasmuch as the land was not injured; Lord Camden directed an issue of *quantum damnificatus*, which order was reversed upon an appeal, which shews how strictly parties are held to their covenants: in the case of *Anderson* v. *Sweet*, so much relied upon, there would not have been a decree, but for the mistake concerning one of the lives. The court will not relieve where there has been an absolute dereliction on the part of the tenant; neither will they relieve where there has been *such neglect* as amounts to a tacit dereliction. In *Foote* v. *Newman*, the foundation of the decree was the minority of the lessee, and that the landlord kept out of the way to avoid making a renewal. In *Wood* v. *Lord Rosse*, part of the fine had been paid; and Lord Rosse by his promise had dispensed with the terms of the covenant, and gave a new equity to the tenant. It is a mistake to say Lord Gilbert was of opinion these leases were inheritances: his successors carried the idea too far, but they were not supported by the House of Lords. It was once held, that in conditions precedent equity would not interfere, because the party being at law obliged to aver the performance, could not prevail; but that distinction is now at an end; but though equity will relieve when compensation can be made, yet in the case of renewals, the party must come in within a reasonable time with clean hands: the minority of Lady Rosse is the only reason assigned by the bill for the delay, but the legislation having empowered the guardian to renew, that was no excuse: the other excuse now set up is, the admission in the answer of Lady Rosse that she set up a title to the whole interest; but this operates the contrary way, for it was the strongest reason why George Murray should have filed his bill: if he had filed it in his life time, Lady Rosse would have had the benefit of a discovery from him, of which she is now deprived. It is said, it appears to have been the intention of the parties that the lessee should have a perpetual interest; that does not more appear in this case than in any

II Anne, c. 3.

other of a lease of lives renewable; but to say it is, in all events, a perpetual interest, is to speak a different language from the parties themselves: acceptance of rent is an acquiescence under the lease, but no acquiescence under the covenant; during the lives Lady Rosse was entitled to nothing but the rent, and none has been received after the death of all the lives.

Lord Lifford, Chancellor, said: the rules contended for on both sides had been laid down with too great a latitude, but he would determine this case merely upon its own circumstances, being very particular: the original lease was said to be a feoffment; if it was so intended, it was clumsily done: the fine payable at the fall of every life, and the covenant to make a new lease, would then be nugatory, for by the feoffment he had parted from his estate, and had nothing afterwards remaining, and therefore he could not make a lease, and the covenant is absurd: he was of opinion the intention was to make a lease for lives renewable; Lord Chief Baron Gilbert only invented the mode of making satisfaction for lapse of time by the rule he adopted respecting septennial fines. Here Lady Rosse might have insisted upon a fine every year; if she had done so, the difficulty might be great: she has not done so, and it comes to the cases of renewal upon terms. His Lordship therefore decreed, that the plaintiffs were entitled to relief, and that the plaintiff W. Murray was entitled to a new grant from the defendants of the lands in question, according to the true purport and intent of the grants or deeds of the 28th October, 1685, and the 16th November, 1708, upon payment of the several fines, and interest for the same, and of the rents and duties, which had become due; and referred it to the master to ascertain the times when the life in being at the time of said grant or deed of 16th November, 1708, and the two additional lives therein inserted, respectively determined; and to take an account of what was become payable for the fines and the interest thereof; in doing of which, he was to charge a fine of £7 10s. as due on the fall of each of the said three lives, which had fallen, and was to compute and allow interest for the same, from the expiration of three months from the fall of each life; and was also to charge a fine of £7 10s. at the end of every seven years from the fall of each life respectively, reckoning seven years for a life, as has been usual in such cases; and to allow interest for each of such fines, to be computed from the expiration of three months

after such supposed fall of a life; and also to take an account of what was become due for the rent and duties reserved and payable by the said deed 16th November, 1708, and the master was to put a value upon the two bullocks, and one fat mutton, annually payable, and to charge such value in the said account: and in computing interest on the said several fines, the master was to compute the same up to the 10th of June, 1764 only, the time when a tender is said to have been made to the defendant Olivia, in case it should appear to the master that a sufficient sum of money to answer the rents, duties, and fines, with interest of such fines, was made to the defendant Olivia on that day, which the master was to inquire into: and in taking the accounts, the master was to make to the parties all just allowances: and on payment of what should appear to be the amount of such fine and interests, and of such rent and duties, the defendant Olivia should execute proper conveyances in law, containing a new grant and confirmation of the said lands, according to the purport and true meaning of the deeds, 28th October, 1685, and 16th Nov. 1708, in which the lives of his Royal Highness the Prince of Wales, and of the plaintiff, W. Murray, and Mervyn Murray his brother, were to be inserted, as the three lives to stand in the place of the lives which had fallen, and all proper parties were to join in such new grant or conveyance, as the master should judge necessary, according to and so far as their respective estates and interest extended, and as they had power to grant; and in case the parties disagreed as to the mode or form of such grant and conveyance, the master was to settle the same. Such new grant to be subject to the claim and demand of plaintiff Sophia, in respect of the £50 per annum, under the settlement; and it being admitted that the defendant Olivia had the possession of the lands for some time, she was to account for the rents and profits during such her possession, and the master was to take such account, and to make the plaintiff, W. Murray, an allowance in respect thereof, and that the plaintiffs should have their costs at law respecting the issue and the trial thereof, but not the costs in equity.

A, Wedderbourne, J. Mansfield.

From this decree the defendants appealed to the House of Lords of Great Britain, before whom it was contended, that the first order ought to be reversed, because the evidence of the agreement of the 21st October, 1730, for surrender of the lease by J. Murray and his son George to the father of Lady Rosse, the appellant, being clear and uncontradicted, the Lord Chancellor of Ireland ought to

have dismissed the respondent's bill on the first hearing, without directing an issue for the trial of that fact by a jury.

But if such issue was proper, the final decree, directing the appellant to grant a renewal on the terms therein mentioned, is submitted to be improper, for the following reasons.

First. The covenant on which the respondents found their pretensions to a renewal, is only to add a new life on the falling of every old one, if the lessee should pay a fine of £7 10s. within three months after: but instead of attending to this restriction of time, G. Murray, through whom the respondents derive their claim, suffered two lives to drop, and about twenty years to elapse without ever tendering a fine; and in consequence of his death in 1763, his life being the last, the lease expired before any kind of application was ever made for a renewal; clearly therefore, in point of law, the right of renewal is no longer subsisting.

Second. Whenever a court of Equity is resorted to for relief against a lapse of time, it is incumbent on the party applying to allege and prove some favorable circumstances in excuse for the omission: the only facts for this purpose, in the present case, are the coverture of the respondent, Mrs. Murray, and the infancy of her son; but however available coverture and infancy may be in other instances, and even though such pleas should in general be deemed sufficient, still they occur too late to operate in favour of the respondents, two of the lives having dropped, and more than seven years from the time prescribed by the covenant to renew, having elapsed, and consequently the right of renewal having been lost, before the title of the respondents, which is a marriage settlement, dated, and pretended to have been made in 1748, but proved not to have been executed till 1758, commenced.

Third. The grounds of the decree in Ireland seem principally to have been, that the original lease in question is without any negative words to make the covenant of renewal void, if the lessee should not pay the fine within the three months limited, and that a power of distraining for the fine of renewal is given; but both of these arguments are open to a plain answer. In respect to the first, the words of the covenant expresses clearly, that the intention of the parties to the lease was only to allow the lessee three months for electing whether he should renew or not, and therefore it was unnecessary to add negative words. As to the second argument, it proceeds on a mistake, for the power to distrain is not for the fine of renewal, but for a

fine of the like sum, in case of the lessee's neglecting to prove, at any Easter court leet, the existence of the lives in being; which latter meant nothing more than to force the tenant to shew, from time to time, how near the lease existing was to its determination, or whether it was not actually determined, and to remove the *onus probandi* from the owner of the inheritance.

J. Dunning. W. Selwyn.

For the respondents it was urged that the decree ought to be affirmed for the following reasons: *First.* For that the appellants, by way of defence to the bill, brought by the respondents, having relied on the purchase made by Hugh Edwards, under the articles of the 21st October, 1730, an issue having been directed, a verdict has been found, to the satisfaction of the court, that no such articles were ever executed.

Second. As to the neglect in tendering the fines for renewal, it is admitted by the appellant, Lady Rosse, in her answer, that she resided in England for some time before the death of G. Murray, who was the survivor of the three *cestui que vies* named in the deed of 1708, and who died in February, 1763; and that she continued in England till November, 1763. While Lady Rosse remained abroad, or out of Ireland, the respondents had no opportunity of tendering the money due for fines. It is admitted, that soon after her return, application was made to her for a renewal. A proper tender was then made, on behalf of the respondents, of a sufficient sum of money for the fines due for renewal of the lease, with interest for the same, which was refused. And it is hoped that these circumstances afford a sufficient apology for any neglect that may be imputed to the respondents, in not making the tender at the time required, in a case where a compensation may be made, and has been offered. It is submitted, therefore, that the decree of the court of Chancery in Ireland was perfectly right.

Lord Thurlow, C. "The subject now before your Lordships has often been discussed in courts of Equity: There are peculiar words in the *habendum* of this lease, and the clause for renewal, and an argument has been drawn from them, *that the grantee took a fee-simple.* But to that, the answer given by the appellants was plain and conclusive, viz. That if the deed conveyed a fee-simple to the respondents, they had no business in a court of Equity: their remedy lay at law by ejectment, and satisfied of their inability upon that grounds, they come into a court of Equity, to try whether they are entitled to that perpetual renewal

which they claim: they insist that if *by error or accident*, they have incurred a forfeiture of their right at law, still they are entitled to relief in equity upon making a full compensation to the lessors by paying the fines with interest from the time they became due.

The intention of the parties was clearly to grant a lease which should by perpetual renewals continue for ever. The lessee contracts that he will do certain acts, and the lessor agrees that upon the performance thereof he shall have a right to perpetual renewals of the demised premises; and a perpetual renewal means an estate for ever. But that is under a covenant on the tenant's part to do all those acts which he agreed to perform: but that contract on the lessee's is not complied with: no sum was tendered within the limited times after the dropping of the lives for the purchase of a new life, according to the terms of the covenant. The lessee then has neglected to do that which he ought to have done. How is equity to interfere? Can conscience compel a man to do that which he has not agreed to do? It is clear he has no remedy at law; it is agreed the right of the lessees upon these covenants has never been ascertained by any settled rule. But I take the rule to be this: *Courts of Equity will relieve the lessee, if he has lost his right by fraud in the lessor, or by accident on his own part, but will never assist him where he has lost his right by his own gross laches or neglect.*

But it has been argued, that if the lessee has not abandoned his right, he ought to be let into his renewal, and that the real value of the estate is great, and far beyond the value of the fines, and that he therefore cannot be presumed to have intended to forfeit his right, and that he has not by any act given cause for conjecture, that he had or ever intended to abandon that right which he had to a perpetual renewal. But I take the rule to be this: *That when the lessee has lost his legal right, he must prove some fraud on the part of the lessor, by which he was debarred the exercise of his right, or some accident or misfortune on his own part which he could not prevent, by means whereof he was disabled from applying at the stated times for a renewal according to the terms of his lease.* I take the true reason why G. Murray did not attempt to renew to be, because he feared the contract for sale in 1730, between his father, himself, and H. Edwards, had effectually barred him not only of that right, but of any right to the estate.

It has been argued that covenants of this kind ought to

receive the broadest extent; that much property will depend upon this decision, and that if this decree should be reversed, it will cause a great confusion in Ireland. But I do not see that any inconvenience can arise from such a decision. It will put them on making their leases with accuracy, and enforce a due compliance with the specific terms on which they are made. This doctrine reduces the law upon this head to the clearest and most simple light possible, but an unlimited right to renewal entangles this species of property in Ireland in a constant series of litigation."

Orders and decrees reversed.

It was ordered and adjudged that the orders and decrees complained of be reversed, and the respondent's bill dismissed.

Observations on the Case of Bateman v. *Murray.*

Observations on the case of Bateman *v.* Murray.

THIS case is the last of the reported cases on Irish renewals which preceded the enactment of the tenantry act in Ireland. These amount to no more than six, and have been reported in the previous part of this treatise; because they constitute the entire law extant on this subject before the statute. There is no doubt however that cases of Irish renewals were very numerous before the statute, although so few of them happen to be reported. Lord Lifford states the fact to be so, and the names and results of some of these unreported cases may be collected from the arguments of counsel in *Bateman* v. *Murray*, for instance *Carpenter* v. *Stewart*, 15th February, 1733, in the Exchequer; in this case there was a negative covenant, that unless the renewal was executed in six months, the lease should be void; the renewal was not demanded within the time, and yet there was a decree for the tenant. *Wood* v. *Lord Rosse* was determined on the general principle of compensation. *O'Hara* v. *Burke*, in the Exchequer, Hil. 1756, is also said to be a case with a negative covenant, and in which the three lives were gone; and no renewal fine offered but by the bill; yet it would seem that a renewal was decreed. *Harrison* v. Sir *Thomas Prendergast*, May, 1754, is also stated to be a case with a negative clause, and wherein all the lives were gone; yet a renewal was decreed. *Kirkwood* v. Lord *Tyrone*, was a case in which a renewal was decreed after a recovery in ejectment. The case of *Shore* v. *Darnley*, in Exchequer, 1766, is also alleged to be a case strongly in favour of renewals.

Renewal cases before the statute unreported.

This case of *Bateman* v. *Murray*, produced the tenantry act. The reversal of Lord Lifford's decree created a great sensation in this country; and although Lord Redesdale contends that there is sufficient fraud in this case to justify a Chancellor in Ireland, even after the Tenantry Act, in taking the same view of it as Lord Thurlow, yet it is certain that at the time of this reversal a general opinion prevailed in Ireland, and an unanimous one amongst its law authorities, that the reversal of the decree in *Bateman* v. *Murray* was grounded on principles of English equity, to the exclusion of what was called "the old equity of Ireland;" and leading to the conclusion, that mere neglect in the tenant, if protracted, might of itself effect a forfeiture; and this same opinion is expressed by the Master of the Rolls in England in the case of *Baynham* v. *Guy's Hospital*, 3 Ves.

This case produced the tenantry act.

The effect of this case in the production of the Tenantry Act, is clearly explained in the judgment of Lord Lifford in *Lysaght* v. *Boyle*, *vide ante*, *pp.* 3, 4, 5.

The tenantry act.

The following is the opinion of Lord Redesdale:—

"The next case is *Bateman* v. *Murray*, which is very important, as having been so much the subject of discussion, and as having been said to have occasioned the act. The only thing remarkable as to the case is, that it is stated to have been a grant in fee-farm; it was really and truly so, with a particular mode of securing the rent and fines, which may be considered in the nature of rent. But what pretence was there to say, that that was a case of mere neglect? G. Murray became entitled upon the death of his father, J. Murray. He was receiver for Lady Rosse; and if he had not been the tenant, he would, as receiver, have thought it his duty to have given notice to the tenant, and called upon him to renew: having that obligation upon him, and having notice, he must be considered as a tenant to whom the receiver had given notice. Two lives dropped: it was impossible but he must have known the fact, and he concealed it from Lady Rosse; notwithstanding which he made a settlement of the lands, and parties claimed under that settlement. Murray denied a knowledge of the death of two of the lives: but he must have known the death of his father, because then his title accrued. Therefore I think his knowledge of that fact, with the circumstance of his being agent to Lady Rosse, were very sufficient ground for considering his neglect as fraudulent; and Lord Thurlow considered it as sufficient ground to refuse a renewal in that

Opinion of Lord Redesdale on Bateman *v.* Murray.

case, whatever might be done in others. Lord Lifford was of opinion, there should be a renewal; the House of Lords thought there should not. There was, besides all this, a very considerable doubt, whether in truth, this covenant for renewal had not been purchased by Mr. Edwards, as the father of Lady Rosse. She insisted it had been purchased by her father, but failed in establishing the fact: but Murray was aware that that was supposed to be the fact: and Lord Thurlow says, the true reason why he did not renew, was, because he feared that the contract for sale in 1730, had barred him of his right. Lord Thurlow considered Murray to have acted fraudulently: there was a contract of some kind or other, and Murray did not choose to ask for a renewal, because if he had, the whole transaction might have been disclosed, and he would not only not have obtained a renewal, but the possession might have been endangered.

Under such circumstances as these, when the tenant does not act fairly, no doubt there should not be a renewal. But where Lord Thurlow says, "equity will not assist where the party has lost his right by *gross* laches," what is the meaning of that? Something like what he states to have occurred in the case then under his consideration; the conduct of G. Murray; or the conduct of Dr. Saunders, in *Pendred* v. *Griffith*, and cases of the same description. So far as I can collect from the note of what Lord Thurlow said in *Murray* v. *Bateman*, he was far from saying that mere lapse of time will bar.

I confess I so far differ in opinion from Lord Lifford, that notwithstanding the passing of the Tenantry Act, I should hold myself bound to refuse a decree for a renewal in *Murray* v. *Bateman* if that case had come before me after the act, because I think there was a fraud. The tenant was agent to Lady Rosse, and bound to discover the deaths of the *cestui que vies*, in the several leases of her estate, and to give notice to the other tenants. He was bound therefore to take notice himself of the dropping of lives in his own lease: he was bound regularly to collect the fines of the other tenants, and to pay his own. I take that to be a case, where the act meant there should be no relief: that is, where fraud was practised; and such conduct in an agent for his own benefit, is fraud.

These are all the important cases which have occurred to me, for the purpose of discovering what was the principle upon which courts proceeded upon the act: and I think

the principles stated by Lord Thurlow, are clear and plain; that "equity will relieve, where there is mere lapse of time unaccounted for, without misconduct in the lessee, or where the lessee has lost his right by fraud in the lessor."—*Scho. and Lef.* 682.

The following is the statute peculiar to Ireland, by which the old equity of this kingdom, which had been shaken by the reversal of Lord Lifford's decree by the House of Lords, was in fact revived; it is called, from its paramount importance, *The Tenantry Act*, entitled:

An Act for the Relief of Tenants holding under Leases for Lives containing Covenants for perpetual Renewals.

19 and 20 Geo. 3. chap. 30.

"WHEREAS great part of the lands in this kingdom are held under leases for lives with covenants for perpetual renewals upon payment of certain fines at the times therein respectively mentioned for each renewal: and whereas from various accidents and causes, such tenants, and those deriving under them, have frequently neglected to pay or tender such fines within the time precribed by such covenant after the fall of such lives respectively: and whereas many such leases are settled to make provision for families and creditors, most of whom must be utterly ruined if advantage shall be taken of such neglect, which will occasion much confusion and distress in the kingdom: and whereas it has been for a long time a received opinion in this kingdom, to which some decisions in courts of Equity and declarations of Judges have given countenance, that courts of Equity would in such cases relieve against the lapse of time upon giving an adequate compensation to the persons, to whom such fines were payable, or their representatives: and to the end that such interests may not be defeated by a mere neglect, where no fraud appears to have been intended, upon making full satisfaction to the lessors, or those deriving under them; be it declared and enacted, that courts of Equity, upon an adequate compensation being made, shall relieve such tenants and their assigns against such lapse of time, if no circumstance of fraud be proved against such tenants or their assigns; unless it shall be proved to the satisfaction of such courts, that the landlords or lessors, or persons entitled to receive such fines, had demanded such fines from such tenants or their assigns, and that the same

Lands held under leases for lives renewable on payment of fines;

neglect of tenants to pay or tender within the times;

that such interest may not be defeated by mere neglect where no fraud, on making full satisfaction;

Courts of Equity on adequate compensation shall relieve such tenants and assigns against such lapse, if

no fraud proved, unless demand of fines proved, and refusal or neglect to pay in reasonable time after.

If difficult to discover tenant or assignee, demand on the lands from principal occupier with two months notice in Gazettes as demand within this act.

Not to affect judgment or decree given, or suit before 15th May, 1780, and now depending.

The Tenantry Act, created under much opposition.

had been refused or neglected to be paid within a reasonable time after such demand.—*s.* 1.

"Provided always, that in case the landlord shall find any difficulty in discovering his tenant, or the assignee of such tenant, so as to make a demand on such tenant or assignee, that then and in every such case a demand made of the said fine on the lands from the principal occupier of the same, together with a notice of such demand, to be inserted for the space of two months in the London and Dublin Gazettes, shall be considered, to all intents and purposes, a demand within this act.—*s.* 2.

"Provided always, that nothing herein contained shall in any sort affect any judgment or decree already given or made, or any suit commenced before the fifteenth day of May, 1780, and now depending for the recovery of the possession of any manors, messuages, lands, tenements, or hereditaments, on account of any lease or leases not having been renewed according to the covenants for perpetual renewals therein contained."—*s.* 3.

It seems that the Tenantry Act was introduced by a committee, including the law officers of the crown, with some of the first characters of the Irish parliament and bar; and yet this bill seems to have worked its way to its enactment through a strong and protracted opposition, until finally, after a four months' struggle, it passed the Lords under a strong protest, including a great portion of the landed interest in fee. It would seem that the opposition resulted from this last mentioned class.

The following are the stages of its progress through the House of Commons:

House of Commons, 15*th May*, 1780.

Ordered, that leave be given to bring in heads of a bill to remove doubts concerning the construction of covenants for perpetual renewals, contained in leases for lives renewable; and that Mr. Grattan, Sir Henry Hartstonge, the Right Hon. Mr. Attorney-General,* Hon. James

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* *A List of those who filled the office of Attorney-General in Ireland, from* 1714.

1714 Rt. Hon. George Gore, made a Judge of the Common Pleas.
1720 Rt. Hon. John Rogerson, made Chief Justice of the King's Bench.
1730 Rt. Hon. Robert Jocelyn, made Lord Chancellor.
1739 Rt. Hon. John Bowes, made Chief Baron of the Exchequer.

Browne, the Right Hon. Mr. Burgh, Mr. Yelverton, and Mr. Holmes, do prepare and bring in the same.

30th May—Mr. Grattan presented to the House, according to order, heads of a bill for the relief of tenants holding under leases for lives, containing covenants for perpetual renewals; which were received, read, and committed.

Resolved, that the House will, next Friday morning, resolve itself into a committee of the whole House, to take the said heads of a bill into consideration. Ordered, that the said heads of a bill be printed.

2d June—The order of the day being read, for the House to resolve itself into a committee of the whole House, to take into consideration heads of a bill for the relief of tenants holding under leases for lives, containing covenants for perpetual renewals; a motion was made and the question being put, that this House do resolve itself into the said committee on the 1st day of September next, the House divided.

Sir Frederic Flood, Mr. Rowley,
Tellers for the Ayes, who went out.....Thirty and Six.

Mr. Grattan, Lieut. Gen. Cunninghame,
Tellers for Noes, who stayed within.....Sixty.

It passed in the negative.

7th June—Ordered, that leave be given to hear counsel before the committee appointed to take into consideration heads of a bill for the relief of tenants holding under leases for lives, containing covenants for perpetual renewals, in favour of said heads of a bill.

1741 Rt. Hon. St. George Caulfield, made Chief Justice of the King's Bench.
1751 Rt. Hon. Warden Flood, made ditto.
1760 Rt. Hon. Philip Tisdall, died.
1777 Rt. Hon. John Scott.
1782 Rt. Hon. Barry Yelverton, made Chief Baron of the Exchequer.
1783 Rt. Hon. John Fitzgibbon.
1789 Rt. Hon. Arthur Wolfe.
1798 Rt. Hon. John Toler.
1800 Rt. Hon. John Stewart.
1803 Rt. Hon. Standish O'Grady.
1805 Rt. Hon. William Cunningham Plunket.
1807 Rt. Hon. William Saurin.
1823 Rt. Hon. William Cunningham Plunket.
1827 Rt. Hon. Henry Joy.

9th June—The House, according to order, resolved itself into a committee of the whole House, to take into consideration heads of a bill for the relief of tenants holding under leases for lives, containing covenants for perpetual renewals; and after some time spent therein Mr. Speaker resumed the chair, and Mr. Tydd reported from the committee that they had made some progress in the matter to them referred, and that he was directed to move the House for leave to sit again. Resolved, that this House will, next Monday morning, resolve itself into a committee of the whole House, to take the said heads of a bill into further consideration.

13th June—The House, according to order, resolved itself into a committee of the whole House, to take into consideration heads of a bill for the relief of tenants holding under leases for lives, containing covenants for perpetual renewals; and after some time spent therein, Mr. Speaker resumed the chair, and Mr. Tydd reported from the committee that they had gone through the said heads of a bill, and he was directed to report when the House will please to receive the same. A motion was made, and the question being put, that the report be now received, it was carried in the affirmative.

Then Mr. Tydd reported that the committee had gone through the said heads of a bill, paragraph by paragraph, and made an amendment thereto, which he read in his place, and after delivered in at the table. And a motion being made that the said heads of a bill be now read, the same were read accordingly. Then the amendment made by the committee to the said heads of a bill was read, and agreed unto by the House. A motion was made, and the question being put, that Mr. Grattan do attend his Excellency the Lord Lieutenant with the said heads of a bill, and desire the same may be transmitted into Great Britain in due form. It was carried in the affirmative.

8th August—A bill, entitled an act for the relief of tenants holding under leases for lives, containing covenants for perpetual renewals, was presented to the House and read the first time. A motion was made, and the question being put, that the said bill be read a second time on Monday next, it passed in the negative. And a motion being made, and the question being put, that the said bill be read a second time on Friday next, the House divided.

Mr. Grattan, Mr. Forbes,
Tellers for the Ayes, who went out..... ..Seventy and Six.

Hon. John Bourke, Mr. John Moore,
Tellers for the Noes, stayed within.....Twenty and Three.

It was carried in the affirmative.

Ordered, that a committee be appointed to compare the transmiss of the said bill with the heads of the said bill sent from this House this session of Parliament.

11th August—A bill, entitled An Act for the relief of Tenants holding under leases for lives, containing covenants for perpetual renewals, according to order, was read a second time. A motion was made, and the question being put, that the said bill be committed, the House divided.

Rt. Hon. Mr. Burgh, Mr. Grattan,
Tellers for the Ayes, stayed within..... ....Ninety.

Hon. Mr. Annesley, Mr. Fitzgibbon,
Tellers for the Noes, who went out.....Fifty and Five.

It was carried in the affirmative.

Resolved, that this House will, forthwith, resolve itself into a committee of the whole House, to take the bill into consideration. And then the House, according to order, resolved itself into the said committee; and after some time spent therein, Mr. Speaker resumed the chair, and Mr. Tydd reported from the committee, that they had gone through the said bill, and that he was directed to report when the House will please to receive the same. Ordered, that the report be now received. Then Mr. Tydd reported that the committee had gone through the bill, paragraph by paragraph, without any amendment. Ordered, that the bill be engrossed. And then the House adjourned until to-morrow morning, ten of the clock.

12th August—An engrossed bill, entitled An Act for the relief of Tenants holding under leases for lives, containing covenants for perpetual renewals, was read a third time. A motion was made, and the question being put, that the said bill do pass, it was carried in the affirmative. Ordered, that Sir Henry Hartstonge do carry the bill to the Lords, and desire their concurrence. Ordered, that John Fitzgibbon, Esq. a member of this House, have leave to appear as counsel at the bar of the House of Peers on the hearing of a petition to be presented to the said House against the said bill.

2d Sept.—Mr. Speaker, with the House, went up to the House of Peers, where the Royal assent was given to

the bill following; An Act for the relief of Tenants holding under leases for lives, containing covenants for perpetual renewals.

Protest of the Lords against the Tenantry Act.

Dissentient.

Protest of the Lords on the Tenantry Act.

Because some part of the lands of this kingdom have heretofore been set by leases for three lives renewable for ever, provided each lessee shall pay a certain specified fine, within a given time after the lapse of each life for the renewal thereof.

And in most instances the lessors have by another covenant provided, that they shall not be obliged to renew any life which drops, unless the tenant shall tender the stipulated fine within the said given time, but shall be discharged from the covenant in that respeet; therefore this bill is altogether unjust.

For it discharges one of the contracting parties from the literal obligations of his covenants, and leaves them obligatory on the other.

For it relieves the lessee against lapse of time if no circumstance of fraud be proved against such lessee; but does not say whether concealment of the termination of one or more lives be fraud within this act.

For the lessee names the lives, and probably of persons unknown to the lessor, and therefore ought to be obliged by this bill to discover the death of each life to the lessor, and the time when it happened, which is not the case.

For it is an *ex post facto* act, construing the intentions of the parties differently from the evident meaning of the covenants.

For adequate compensation, as prescribed by this bill, cannot be made in some instances, as in the case of tenant for life, and remainder man, when some of the lives drop in the life time of the tenant for life, and yet the fines are not paid until the remainder takes effect by his death.

For it has hitherto been an established rule of equity, that a court would not grant relief for lapse of time unless the lessee accounted for his laches; and this bill requires a court of Equity to relieve without requiring the lessee to account for his laches.

For it applies one rule to all cases; it makes no difference where there is a remedy for recovering the fine, and

where there is none: it makes no difference where there has been a neglect for a few days, and one life only dropped, and where all the lives are dropped, and perhaps twenty years elapsed: it makes no difference where the fine payable for each life amounts to a large sum of money, and where it is only a pepper corn.

For these, and a variety of other reasons mentioned in debate, we wished to set aside this bill; and being sincerely anxious to procure for the tenants to such leases every relief which a just, fair, and equitable bill could give to them, we earnestly, strenuously, and repeatedly urged that the judges should be directed to draw such a bill as should answer this most desirable purpose; and which, instead of doing injury to one man under pretence of relieving another, should do equal and impartial justice to all men.

Tyrone,	Ely,
Carysfort,	Antrim,
Lisle, *by Proxy.*	Powerscourt,
William Dromore,	Mount Cashel,
Mountmorres,	Aldborough, *by Proxy.*
Richard Armagh,	Moira,
Charles Cashel,	Shannon,
Arran,	Kingston, *by Proxy.*
Bective,	Donerail,
Templetown,	Glerawly.
Southwell,	

Observations on the Tenantry Act.

This act is declaratory as well as enacting.

Opinion of Lord Redesdale thereon:

THE following are observations of Lord Redesdale on this act:

"The act is declaratory as well as enacting; and I take it not to have declared any thing against the cases which had been determined; it does not say that such decisions were against principle, and should not have been made: that would not have been consistent with the body of the act, and if such had been the intent of the legislature, the proviso "that nothing therein contained should in any sort effect any suit then depending," would have been absurd. I understand the act therefore only to have declared that in certain cases, courts of Equity had relieved against mere neglect; that it was fit they should continue to do so; that it was proper there should be some rule in future as to what should be considered mere neglect, and the act

thereupon proceeded to lay down that rule, as applicable to cases not then in litigation."—2 *Scho. and Lef.* 682.

Opinion of Lord Lifford.

Of Lord Lifford.

"The voice of the people expressing a dissatisfaction with that determination of the Lords (in *Bateman* v. *Murray*,) and a general alarm in consequence, brought the point before the legislation, and the *old equity* was revived by the 19th and 20th of the King."—*Vern. and Scriv.* 143.

Opinion of Lord Perry.

Of Lord Perry.

"I cannot help expressing my surprise, that in the case of *Murray* v. *Bateman*, the Lords in England should overturn the known settled law in such cases. That decision made it necessary to pass the Tenantry Act, to prevent the confusion that was likely to arise in this kingdom from that determination."—1 *Ridg.* P. C. 477.

Distinction between the declaratory and enacting part.

It is clear now from the statute, as well as from the cases before the statute, what the old equity of Ireland was; it is set out in the preamble of the statute, and it is expressed by Sir Pepper Arden, Master of the Rolls, in 3 *Ves. Jun.* 297, that this "local equity had gone upon the idea, that a renewal might be claimed at any distance of time." The revival of this equity is therefore the declaratory part of this statute; but there is an additional ingredient added to the old equity by the statute, and which shall thereafter make a part of the equity which must be administered by the statute, namely, that the lessor or his representatives shall thenceforward have authority to circumscribe and put a termination to this protracted neglect in the tenant, in respect to which there was no definite termination before the statute; and this is the chief enacting part of the statute, according to which the lessor or his representative is authorized to call upon the tenant by a notice to pay up the fines due, &c. and in the event of the tenant neglecting so to do, within a reasonable time after such notice, his right of renewal to be forfeited by such neglect.

The old equity revived and modefied by the statute.

Thus the *old equity* is not only revived, but modified by the Tenantry Act; and the statutable shape which it took thenceforward is described in the following words by Lord Lifford.

The equity under the statute described by Lord Lifford.

"By that act it is provided, that in all cases of mere neglect, where no fraud appears to have been intended, no dereliction on the part of the tenant, by neglecting or refusing to renew after the landlord has demanded the fine, courts of Equity shall relieve upon an adequate compensation being made."—1 *Ridg.* P. C. 407.

And by Lord Redesdale in the late case of *Fitzsimon* v. *Burton*, not heretofore reported.

And by Lord Redesdale in the late case of Fitzsimon *v.* Burton.

"My Lords, an act was passed in the 19th and 20th years of the reign of his late Majesty, which was produced by these circumstances: my Lord Lifford in the court of Chancery in Ireland had decreed a renewal in a case in which the House of Lords here, which then entertained appeals from decisions of the courts in Ireland, were of a contrary opinion, and they reversed his Lordship's decree. My Lords, that case it was my duty when in Ireland to review very minutely, and upon what principle my Lord Lifford could have made that decree I cannot conceive, for it was a case of the grossest fraud that perhaps ever existed; it is scarcely possible to conceive a case of grosser fraud. The man who had the benefit of the lease was the agent for the family to whom the reversion belonged, he was calling perpetually on all the other tenants to renew the leases, but he took care not to call upon himself to renew his own lease; that was a circumstance furnishing in my mind a sufficient ground for reversing Lord Lifford's decision. My Lords, this caused a great deal of alarm in Ireland; it was supposed that what was called the old equity was abridged, and an act was passed which has been since the guide to all the courts in their decisions. That act of Parliament says, that the courts, on an adequate compensation being made, shall relieve tenants and their assignees against lapse of time if no circumstance of fraud be proved against such tenants or their assignees, unless it be proved to the satisfaction of such courts, that the landlords, lessors, or persons entitled to receive those fines, have demanded such fines from the tenants or their assigns, and that the same have been refused or neglected to be paid within a reasonable time after such demand."

Cases after the Statute.

Cases after the Tenantry Act.

THE progress of this treatise leads next to the consideration of the cases which were decreed *after* the statute, the first of which is,

The tenant under the circumstances of this case decreed entitled to a renewal notwithstanding the

The Rt. Hon. John O'Neil, Appellant. *Thomas Maurice Jones, and Roger Hall, Esqrs.* Respondents.	JOHN O'NEIL, Esq. appellant's grandfather, being seised in fee of the lands of Money-glass, by lease, 15th April, 1726, demised to William Morris Jones, Esq.

death of all the *cestui que vies*, and that the lease contained a negative clause.

grandfather of respondent Thomas, for three lives, at £25 yearly rent, the lessee, his heirs, &c. performing the covenants therein expressed, one of which was, that said William M. Jones should restore the possession upon the determination of the term thereby granted, with all improvements. In this lease was also contained a covenant, that upon the decease of the three lives, and upon the payment of £12 10s. for every new life by the said W. M. Jones, within six months next after the decease of any of the lives, above the rent, and all arrears, the said J. O'Neil, his heirs, &c. would add such new life and lives, and so *toties quoties* in like manner from time to time for ever. *Provided* that if the said W. M. Jones, his heirs, &c. should *not pay* said J. O'Neil, his heirs, &c. the said £12 10s. above all arrears, *within six months* next after the death of the nominee for the time being, and should not within the said time nominate the life of another person to be added, *then the covenant for renewal should be void*, and the premises, after the decease of the life or lives then in being, should remain to the said J. O'Neil, his heirs and assigns, *freed from the said covenant of renewal.*

Vern. and Scriv. 181, this case cited.

On the 15th September, 1735, W. M. Jones, the lessee, and who was one of the lives, died, and on the 15th March following, being within the six months, a renewal was obtained by adding the life of Mary Morris Jones; William was succeeded by his eldest son Thomas, who attained his full age in the year 1741. On 1st March, 1755, Mary Jones died, and on 9th April, 1765, Ann Jones, another of the lives, died; Thomas Morris Jones, the surviving life, died in September, 1769, leaving two sons, Robert, and the respondent; the former continued in possession till his death in February, 1775, when he was succeeded by respondent, under a marriage settlement. The appellant, to whom the inheritance had descended, as of Hil. Term, 1775, brought an ejectment upon the title; and in July following respondent filed a bill for a renewal and for an injunction, stating, that he was a purchaser for valuable consideration, under a marriage settlement, a portion of £3000 being given to his father upon a supposition that the lands in question were a permanent estate: that Thomas Morris Jones, being a man of dissipation and negligence, suffered an arrear of rent to become due, to discharge which, and and also to pay a fine of £12 10s. due upon the death of Mary Morris Jones, a treaty was entered into between Charles O'Neil, appellant's father, and Thomas Morris

Jones, by which the latter agreed to sell to the former the lands of Lenagh, the purchase money of which exceeded all arrears of rent and fine: the final execution of this agreement was postponed under various pretences by Mr. O'Neil, or his agent: but however it had proceeded so far as that two accounts were furnished, one of the rent due, another of the value of the lands to be purchased. T. M. Jones was obliged to leave the kingdom, and immediately after his return in 1766, personally applied to Charles O'Neil for a renewal, who still deferred the matter; at length they met in 1767, when the terms of a renewal were finally settled and all rent was shortly afterwards paid, and two lives were nominated. In 1768 they had another meeting, when £138 16s. was paid, being the whole arrear. A draught of a lease was produced and approved of by Charles O'Neil, who gave directions to his attorney to have it engrossed, which was accordingly done. T. M. Jones met with an accident afterwards, which prevented his coming to town to execute the lease: he died in December, 1769, and Charles O'Neil died in August preceding. Robert Morris Jones, upon the death of his father, applied to appellant, and in 1774 shewed a plan of improvements which he intended to make, estimated at £700, which appellant said would add much to the beauty of the place, and suggested some alterations which might be made. Respondent's title accrued in February, 1775, at which time he applied to appellant for a renewal, but received no answer. The respondent, Roger Hall, was merely a trustee in a settlement. Judgment upon the ejectment was given by consent.

Lord Lifford.

This cause was finally heard on the 11th November, 1782, when the Lord Chancellor decreed the plaintiff entitled to a renewal; that defendant J. O'Neil should make a new lease for the three lives named, with a covenant for renewal according to the original lease, upon the payment of nine several sums of £12 10s., three of them as fines upon the fall of three lives, with interest from the expiration of six months after they respectively dropped: three more as fines upon the nomination of new lives, with interest from the nomination; and the remaining three as septennial fines, where seven years had elapsed between the fall of one life and the nomination of another, with interest in the like manner: and as a further compensation for the laches of the respondent, he was ordered to pay to the appellant his reasonable costs.

H. Duquery, C. O'Neil, J. Wallis, J. Hewitt.

A tenant guilty of laches induces a forfeiture of his interest.

The appeal was brought to reverse the decree, and it was argued,

First. That considering this case on the principles of the old equity, the tenant has been guilty of gross laches and neglect, sufficient to induce a forfeiture of his interest, being bound by his covenant expressly to nominate his lives and tender his fines within six months after the fall of each life, under the penalty of forfeiting his right of renewal altogether; and although thus expressly bound, neglecting, and ever avoiding to renew for twenty years after the fall of the first life; for nine years after the fall of the second life; and for six years after the fall of the last life contained in his lease; it is a maxim in law, that *crassa negligentia æquiparatur dolo.*

Secondly. Among the several excuses offered in courts of Equity by tenants holding under leases for lives renewable for ever, not one can be adduced in favour of the respondent; not ignorance of the fall of the several lives, all of them being his near relations; nor infancy, the tenant being of full age during the lapse of every life; and not absence from the kingdom, the tenant being constantly (two years only excepted) on the lands, and in the vicinity of his landlord: the respondent therefore, it is conceived, stands destitute of every equitable excuse for the most obstinate delay.

19 and 20 G. 3. c. 30.

Thirdly. The respondent can in this case derive no aid whatsoever from the late act of Parliament, entitled the Tenantry Act, the proviso* in that act having expressly excluded all cases where a suit was depending, or a judgment obtained: in this case the appellant had brought his ejectment, and had issue joined at law, before any bill was filed on the part of the respondent. Appellant obtained judgment by consent, shortly after the filing of the bill, and long before the enacting of the tenantry law.

Fourthly. In the present case, the landlord demanded and repeatedly called upon the tenant to renew his lease (particularly in the years 1764 and 1767), while the tenant on his part declined and artfully avoided complying with the just requisition of his landlord, fraudulently concealing the fall of the respective lives, and never paying or tendering any fine whatsoever: yet he now attempts to avail himself of his own fraud and evasion, by endeavour-

* *Vide Vern. and Scriv.* 190, where Lord Perry gives a history of the proviso.

ing to make the demand on the part of his landlord, and the meeting in consequence of that demand, a waiver of all the neglect on the part of the tenant; a demand which never was complied with, but constantly evaded; and it has been uniformly held, not only on the principles of the ancient equity, but from the provisions of the late act of Parliament, that a demand on the part of the landlord, and a declining to renew on the part of the tenant, will amount to a forfeiture of the tenant's interest.

A demand by the landlord and declining to renew by the tenant, amounts to a forfeiture.

Fifthly. To violate or wound the late Tenantry Act on one side to the prejudice of the landlord, must lay it open to the like wound on the other, to the prejudice of the tenant. And the decreeing a renewal under the circumstances of this case, militates not only against the first exception, but also against the negative proviso contained in the act, and destroys the security intended for the landlord by that salutary law.

J. Fitzgibbon, H. Carlton, J. Toler, B. Boyd.

In support of the decree it was said,

First. That it does not appear that the respondent in this case, or any of his ancestors, were guilty of any fraud, dereliction, or wilful neglect, or refusal to renew the lease of Moneyglass when any of the lives in the lease had dropped, or that he or they were ever called on by the lessor or his heirs for the purpose of renewing, but the contrary in every stage of the case appears.

Secondly. All cases of leases for lives renewable for ever, have been governed in this kingdom by an ancient and long established rule of equity, which was, that mere laches on the part of the tenant should never work a forfeiture of his lease, but that the landlord should be compelled to renew at any time, even after the fall of *all* the lives, upon receiving a full and adequate pecuniary compensation: and

Cases of leases for lives renewable for ever governed by an ancient equity in Ireland.

Thirdly. So conscious was the legislature of Ireland of this having been the old equity of the land, that when some of the decisions of the courts here were reversed in another kingdom,* upon principles that did not exist here, that it was thought expedient to prevent the growth of the mischief that was springing from those decisions, by making a law declaring what had been the equity of this kingdom in these cases, and declaring that in future all cases of leases of lives renewable for ever should be determined by that equity.†

That mere laches never work a forfeiture.

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* *Vern. and Scriv.* 145, 157. † *Vide Ante, p.* 6.

Fourthly. Charles O'Neil, the appellant's father, having agreed to renew the lease and to insert in it the lives of the respondent's brother, he thereby waived all advantage of forfeiture, if any there was; and equity will consider that as done which had agreed to be done, and therefore that the respondent ought to be considered as having a subsisting title.

Fifthly. Such leases of lives renewable for ever have been ever considered in this kingdom as perpetuities, and upon that idea the respondent's father obtained a large marriage portion with respondent's mother. That the respondent ought therefore to be considered as a purchaser of these lands, for full and valuable consideration, and three lives were in being at the time of respondent's father's marriage with respondent's mother.

Appeal dismissed, decree affirmed.

After hearing counsel, it was ordered and adjudged, that the appeal be dismissed and the decree of the court of Chancery therein affirmed.—1 *Ridg.* P. C. 170.

Observations on the Case of O'Neil v. *Jones.*

Distinction between the old equity, and the equity after the statute.

THE decree in this case was pronounced subsequently to the Tenantry Act; but the suit had commenced before the 15th May, 1780, for the recovery of the possession; and therefore this case came within the provisoes in the statute, and was not subject to its enacting provision; but of course it had the benefit of its declaratory provisions, that is, to the equity before the statute. The rule of equity before the statute, which was overruled by *Bateman* v. *Murray*, was again revived by the statute with an addition thereto. The old rule was an indulgence to mere neglect, however protracted, on compensation: the new rule recognized that indulgence; but enabled the landlord to circumscribe its indefiniteness, and limit it to the circumstance that the tenant's right should be extinguished, unless he paid up his fines, &c. within a reasonable time after demand: so that this last circumstance of demand, and its consequences, constitutes the essential difference between the old equity of Ireland and the equity after the statute.

Boyle *v.* Lysaght, the most explanatory case of the Tenantry Act.

The next decree pronounced on a renewal in Ireland after that of *O'Neil* v. *Jones*, was in the following case, which of all the cases is the most explanatory of the cause, objects, and provisions of the Tenantry Act.

House of Lords, Friday, March 23, 1787.

John Boyle, Esq.
Appellant.
Ann Lysaght, Mary Coote Purdon, Administrators of *Henry Wrixon, Esq.*
Respondents.

Decree affirmed by which tenant was declared entitled to a renewal of his lease containing an intricate and perplexed clause, which had been considered by the parties as a covenant for perpetual renewal. The history of renewableleases and the principles upon which renewals have been decreed. Terms for years determinable upon lives, with covenants for renewals, are within the Tenantry Act, 19 and 20 Geo. 3. c. 30.

This was an appeal from a decree of the court of Exchequer, by which Henry Wrixon was decreed entitled to a renewal from the appellant of a lease of the lands of Knockaneglass and Killynecronane, about six hundred acres in the barony of Duhallow, and county of Cork. The last and only existing lease was executed by the appellant's father, in the year 1739. In it was recited, that in the year 1660, John Lord Kingston, being seised in fee of the premises, demised them to two persons of the names of Uppington and Nagle, for 99 years from the first day of November then next, if three lives then in being, and named in the lease, or any, or either of them should so long live, at the yearly rent of £20, payable half-yearly, with a *nomine pœnæ* of 2s. 6d. for each day said rent should remain unpaid after demand; and in said lease was contained a covenant *for renewal for ever*, on the fall of every life, on tenant's paying £20 for each renewal within twelve months after the fall of each life. That the inheritance being afterwards vested in Bellingham Boyle, the elder, (the appellant's great uncle,) and the interest of the lease in John Freeman, and one of *cestui que vies* having died, a renewal was executed in the year 1717 by said Bellingham Boyle to John Freeman for 99 years, provided Judith Freeman, otherwise Crofts, William Freeman, and Richard Williams, or any or either of them should so long live, with the like covenants, &c. as were contained in the said original lease. The lease of 1730 further recites the death of William Freeman, one of the lives, and that the lessee had, within the time limited by the covenant, paid the renewal fine and nominated another William Freeman, to be inserted in the place of the life fallen. In 1739, the inheritance being vested in Bellingham Boyle the younger, (father to the appellant,) and the interest of the lease in Henry Freeman, Bellingham Boyle the younger, by indenture, dated 7th January in that year, demised the lands to Henry Freeman for 99 years, provided Judith Freeman, William Freeman and Richard Wil-

liams, or any, or either of them, should so long live, subject to the former rents, *nomine pœnæ*, clauses, &c. The clause therein, which the respondents contended was to be considered as a covenant for perpetual renewal was this: "Provided always, and upon this further and express condition, that if any of the said parties, viz. Judith Freeman, alias Crofts, widow of Richard Freeman deceased, Richard Williams son of the said Oliver Williams, and William Freeman son of the said John Freeman, shall or do happen to die before the said term hereby demised, and that such other person or persons who shall then have the estate and interest for the years hereby demised, and then to come, of and in the premises by survivorship or any other way, shall not, within the space of twelve months next after the decease of such of them the said Judith Freeman, alias Crofts, widow, Richard Williams son of the said Oliver Williams, and William Freeman son of the said John Freeman, which shall first happen to die, by his or their deed or deeds lawfully executed, surrender and yield up unto the said Bellingham Boyle, his heirs or assigns, or to such other person or persons to whom the next or immediate reversion or remainder of the said premises expectant upon the said term and demise hereby made, shall then respectively appertain, all this and their estates, term and interest made and granted by virtue of these presents either absolutely or upon condition in the said deed or surrender to be contained, to this effect, viz. That if any such person or persons to whom such surrender shall be made, shall not within the space of three months after delivery of such deed of surrender and payment to him or them made of the sum of £20 sterling, of lawful money of Great Britain, and tender made of an engrossed draft imprinted or otherwise purporting a new lease of the said premises to be made to such person or persons so surrendering the same, their executors, administrators and assigns for the term of 99 years, to begin from the said first day of May last past, and to be determinable upon the death of such of them the said Judith Freeman, alias Crofts, widow, Richard Williams, and William Freeman, son of the said John Freeman aforesaid, as shall be then living, and the death of one other person then living to be nominated by such party surrendering, and in such engrossed draft to be named, and the death of the longest liver of them, *with the like reservations, conditions, and covenants, as in these presents are contained mutatis mutandis* and

Renewal clause.

with the like condition for surrendering *mutatis mutandis*, as in this present proviso, seal and deliver the said draft as his, her, and their act and deed, then the said surrender to be void; then these presents, and all the estate hereby granted shall from thenceforth cease and be void. And the said Bellingham Boyle doth hereby for himself, his heirs and assigns, covenant to and with the said Henry Freeman, his executors, administrators and assigns, that he the said Bellingham Boyle, his heirs and assigns, shall and will, *from time to time*, on such surrender and payment, and reservations aforesaid, perfect, seal and deliver, such deed in manner as herein provided, and that if he or they, or his or their heirs or assigns, or the heirs or assigns of the survivor of them, shall refuse so to do for the space of three months after such surrender, that then the said deed of surrender, and every clause thereof, shall be void, and this present deed to remain and abide good and firm in the law to the said Henry Freeman, his executors and assigns, for their lives respectively, and after their deaths, to their executors, administrators and assigns, for the remainder of the said term of 99 years herein mentioned, nominated, and expressed, under the same yearly payments and reservations therein likewise expressed, and that the executors, administrators and assigns of the said Henry Freeman, and the survivor of them, shall and may peaceably and quietly have, hold, and enjoy the same without any let, trouble, or molestation, of him the said Bellingham Boyle, his heirs and assigns, and any person claiming or deriving by, from, or under them, or either of them, for the remainder of the said 99 years, the said surrender or any thing in this present demise to the contrary thereof, in anywise notwithstanding."—In 1739 or 1740, Judith Freeman died, and in April, 1744, the interest in the lease was conveyed to Henry Wrixon (subject to some incumbrances which he has since paid) in consideration of the sum of £1200 and and upwards. In 1749, Wrixon paid Mr. Boyle a renewal fine of £20 and nominated a life in the place of Judith Freeman, Mr. Boyle giving this receipt, "Received from Henry Wrixon, Esq. by the hands of Mr. Nicholas Wrixon, the sum of £20, sterling, for a renewal fine of his lease of the lands of Freemount and Knockaneglass, in the county of Cork, for inserting the life of Freeman Crofts, son of Wills Crofts of Churchtown in the county of Cork, in the place of Judith Freeman, deceased, the life therein named. Dublin, January 16th 1749. Bellingham Boyle."

On the 22d of April, 1760, William Freeman, another of the *cestui que vies* died; in 1765, H. Wrixon paid the renewal fine, with three years interest, and nominated a life to James Harnett, Mr. Boyle's agent, who gave this receipt, "Received from Henry Wrixon, Esq. of Glinfield, £20 sterling, fine, on renewal of his lease of Freemount and Knockaneglass, and also £3 for interest of said sum for three years; the life now named by Mr. Wrixon being that of Robert Sealy, son of George Sealy, of Bandon, in the room of William Freeman, Gent. Cork, 18th November, 1765. I say received for the use of Bellingham Boyle, Esq., James Harnett." In 1771, the appellant's father died; whereupon the inheritance vested in the appellants, and in November of the same year, Richard Williams, the last of the *cestui que vies* in the renewal of 1739, died. In 1774 H. Wrixon applied to Thomas Fuller, the appellant's agent, to receive the renewal fine, and to have a life named. Fuller wrote to the appellant for his permission, but not receiving any answer, he concluded Mr. Boyle was satisfied to renew. He accordingly took the fine and gave this receipt, "Received from Henry Wrixon, Esq. £20 sterling, fine, on renewal of his lease of Freemount and Knockaneglass, for inserting the life of James Fuller, son of Mr. Thomas Fuller, treasurer of the county of Cork, in the place of Richard Williams, deceased. Received by me, for John Boyle, Esq. Cork, June 24, 1774. Thomas Fuller." But having afterwards received a letter from the appellant's attorney, desiring him to return the fine, he applied to Mr. Wrixon, who consented to take back the fine, and give up the receipt, which he did on the 13th of August, 1774. The appellant continued to receive the rent reserved by the lease to 1776. In 1780, he brought ejectments on the title, as of Trinity term, laying the demise on the 1st day of June in that year.* On the 8th of November, Mr. Wrixon filed his bill, praying, That the appellant might be obliged to execute a renewal of the said lease, pursuant to the said

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* In the statute 19 and 20 Geo. 3. c. 30. commonly called the Tenantry Act, it is provided, That nothing therein contained shall affect any judgment or decree already given or made, or *any suit commenced before the 15th of May*, 1780, for the recovery of the possession, &c. on account of any lease or leases not having been renewed according to the covenants for perpetual renewals, therein contained.

original lease, for the lives of the said Freeman Crofts, Robert Sealy and James Fuller, tendering the fine and interest for the same, according to the usual mode of computation, and praying that the appellant might be restrained by injunction from proceeding on the ejectments; and also praying general relief. The appellant in his answer, admitted the original lease and renewals; but insisted that the lease had become absolutely void by non-performance of the terms of the proviso, and therefore incapable of being set up by the acceptance of rents and fines; and though it were capable of being set up, yet that Bellingham Boyle, the appellant's father, had not power to do it, having been made tenant for life, with limited powers, by a settlement made in 1736; and he further insisted, that fraud had been practised on his father, in concealing the true times of the falls of the lives.

Note. In the argument before the Lords, little was said upon the settlement of 1736, and none at all upon the determination. It was a voluntary deed, not made upon marriage, or for any valuable consideration.

On the 13th of November, 1782, the court of Exchequer decreed, that the plaintiff was entitled to a new lease for a term of 99 years, provided the lives of Freeman Crofts, Robert Sealy, and James Fuller, or any of them, should so long continue, at the rent, and under the covenants, clauses, provisoes, conditions, and agreements, mentioned in the lease of 1739, upon the said Henry Wrixon's paying to the appellant the sum of £20 as a renewal fine, on the death of Richard Williams, with legal interest from the 1st day of November, 1772, and also the sum of £20 as a renewal fine, with legal interest for the same, from the time that it ought to have been paid; together with all rent and arrear of rent, and that an account should be taken thereof by the Chief Remembrancer or his deputy; and that the said Henry Wrixon should pay unto the appellant, the costs expended by him in the said cause; the same to be taxed by the said Chief Remembrancer or his deputy. In 1784 Henry Wrixon died intestate. The respondents, his daughters and heirs at law, obtained administration, and revived the cause. Mr. Boyle appealed from that decree of the court of Exchequer, and the appeal was heard the 21st, 22d, and 23d days of March, 1787. Mr. Attorney-General, and Mr. Woulfe for the appellant. Mr. Duquery and Mr. Curran for the respondents. After the arguments at the bar, the Lord Chancellor addressed the House, as follows:

My Lords, your Lordships must have heard counsel on both sides upon this appeal, and it is now ripe for your determination. In the course of the argument a good deal has been said upon the subject in general, which I think is a matter of great and universal concern in this kingdom—I say of universal concern, because a great part of the lands in this kingdom has been for a long time held by leases depending upon lives, with covenants for perpetual renewal. In this I am warranted by the express words of the recital of the statute 19 and 20 of the king, chap. 30—" Whereas great part of the lands in this kingdom are held under leases for lives, with covenants for perpetual renewals upon payment of certain fines, at the times therein respectively mentioned for each renewal."

Here Lord Lifford* gives a history of this tenure in Ireland, and of the determinations concerning it in our courts.—*Vide ante*, p. 3.

Lord Lifford then continues, and the case proceeds as follows:

By that act (the Tenantry Act) it is provided, that in all cases of mere neglect, where no fraud appears to have been intended, no dereliction on the part of the tenant, by neglecting or refusing to renew after the landlord has demanded the fine, courts of Equity shall relieve upon an adequate compensation being made. It professes to provide for leases for *lives*. What are leases for lives within the fair and equitable construction of the statute? It is said a lease for 99 years, determinable upon lives, (as this is,) is not a lease for lives, for it is but a chattel; but what is it in substance and equity? I say it is in point of equity and substance, as to this matter, and the relief to be granted as much a lease for lives, as a lease for lives at law; for what is it? It does not depend upon the number of years, but drops with the lives, and therefore this is a case of a

Leases for years determinable upon lives are in equity and substance as much leases for lives as a lease for lives at law.

* James Hewitt, an Englishman, having been brought up to the English bar, attained there the rank of Judge of the King's Bench, whence he was promoted to be Lord High Chancellor of Ireland, 1768; and at the same time created Baron Lifford of Lifford in the county of Donegal. He was further advanced to be Viscount Lifford, January 4, 1781. He died April 28, 1789. Mr. Hardy says, " he owed his elevation to Lord Camden, who was always firmly attached to him. He was esteemed an excellent lawyer, an impartial judge, and his patience and good temper on the bench, were exemplary.

lease *for lives*, within the statute. That act provides expressly that in every case of mere neglect, where there is no fraud, no dereliction by the tenant, equity shall relieve. Let us then consider the present case: the original lease was an old one, made in the year 1660, under which there has been an enjoyment for 127 years: it was determinable upon the fall of three lives, with a covenant which I suppose the same with that which your Lordships have heard so much of. The original lease itself is not in being, nor is that to be wondered at: a renewal was executed in 1717, nor has this been produced, but that may easily be accounted for; the old leases were probably given up upon the execution of new ones. The only lease now in being is one made in 1739; it contains a covenant, which is a very singular one, and does not deserve much commendation; it merits the character which has been given to it at the bar, of being the production of a shallow understanding, much caution, and great perplexity. The parties themselves seemed to have thought it deserved very little attention, and to have considered it as a covenant for perpetual renewal. Since this lease is a lease for lives within the statute, fairly and equitably, the second point is, is there a covenant for perpetual renewal? As to this there has been much disagreement; I mean the counsel at the bar have much disagreed about the construction of this covenant. But how have the parties themselves considered it? The lease executed in 1739 begins with a recital of the original lease, as containing a covenant for perpetual renewal. Had they, at that time, any notion that a surrender within twelve months by the tenant was necessary, and that if the landlord did not accept the surrender, the term should become absolute for the residue, discharged of all covenant for renewal? No: they looked to this; they, *both* the tenant and Mr. Bellingham Boyle, considered the lease as a perpetual interest; for in 1740 a life falls, and then what is done? Why, nothing—it rests in *neglect* on both sides till 1749—for I see no fraud; but that matter I shall consider presently. In 1749 a fine is paid, and a receipt given, and a life named; and so it goes on without the formal execution of a renewal. They considered it then as a perpetual interest; but it is said Mr. Boyle was in error; that he was an indolent man, and ignorant of his tenant's title. See how that was: from 1749 to 1760, it goes on in the same way; in that time it may reasonably be supposed that Mr. Boyle might have been waked, and might have looked

a little into his affairs. In 1760 another life dies; the tenant comes four years after; another fine is paid, and another life named in the same manner as before, without any renewal being executed: and I do believe that more renewals of leases of this kind have been made merely by the payment of the fine, and a nomination of a new life, than by the execution of new leases; tenants in general remain satisfied with this equitable security of their titles; and equity will consider that as done which ought to have been done. Thus it goes on till Mr. Boyle's death in 1771: in that year another life falls: in 1774 the tenant goes to the agent, names a life, pays the fine, and takes a receipt nominating the life, as he had done before; then this point concerning renewal of leases came to be somewhat talked of, and Mr. Boyle, the present appellant, writes to his agent to return the fine that he had received, (by the bye, a receipt from an agent that has been used to receive, is as valid as one by the principal;) to this the tenant agrees, he takes back the fine, and gives up the receipt, consenting that his claim should undergo a fair discussion: in my opinion, he acted very candidly, and very honourably. Then comes this question, is there a covenant for perpetual renewal? The covenant is a very strange one; but the lease seems to have been considered by the parties as a perpetual interest. It is a case of mere neglect; the landlord does nothing; the tenant does nothing; it is a case of supineness on both sides. But it is said the covenant is in particular words, and that the tenant is bound to surrender conditionally within twelve months after the fall of a life. What! shall the lease be absolutely void, merely for want of the surrender? Is that a case not relievable in equity? The landlord has received his rent from time to time. I do not deny, that at law, the term may be gone; but it is admitted at the bar, that upon a bill properly framed, a court of Equity could supply the want of a surrender; so that it is a case where a court of Equity could relieve. There is in the bill a prayer of general relief, and a court of Equity will adapt its relief to the circumstances of the case: it would consider the tenant as much relieveable by supplying a surrender, as by decreeing a renewal in common cases. As to the terms being at an end, it is quite out of the case, in the consideration of a court of Equity.

Equity considers that as done, which ought to be done, therefore the payment of a fine and nomination of a life is a renewal in Equity, although no renewal lease be executed.

A receipt from an agent that had been used to receive, is as valid as one by the principal.

A want of surrender is relieveable in Equity.

Has there been any fraud, any dereliction, or demand by the landlord, and refusal by the tenant? It has not been said that there has been any dereliction: but it is said that

there has been fraud on the part of the tenant. This is a case particularly circumstanced, and more favourable for the tenant than any I remember; the three fines have been paid, the lives nominated, and all of them are living; in two cases the fines have been received. It is said there is fraud; where is it? It is said no interest was paid in 1749, upon the payment of the fine, consequently it is said it must be inferred, that the time of the death of the *cestui que vie* was fraudulently concealed from Mr. Bellingham Boyle, a gentleman residing in the neighbourhood! To this I say, that fraud is never to be presumed in any case: besides, what does the act say? "Where no fraud *appears* to have been intended;" now has any *appeared* here? Then again, it says "if no circumstance of fraud be *proved*:"—is this a case where fraud has been *proved?* How is the next case? A life falls in 1760, the fine is not paid till 1765, and then only £3 is paid for interest, whereas it ought to have been £4; this is fraud! Now I believe the tenant had a year to renew in; but even suppose it ought have been £4, we all knew Mr. Bellingham Boyle to have been of a very generous and liberal disposition, and as likely as any man to say to his tenant, "I will not insist on the interest, I am satisfied with the fine;" at least this is rather to be presumed than that there was any fraud. Afterwards, upon the fall of a life in 1771, the tenant goes to the agent or steward and pays the fine; this is fraud! it is said he ought to have gone to the principal: now who was more likely to know the affairs of the estate, the agent who transacted the business of it, or a young gentleman just come into the possession of his property? I think if the tenant intended fraud, he would rather have gone to the principal, who was less likely to know his title, and would probably have been willing to receive the money.

Fraud is never to be presumed, and should be proved.

The covenant on the part of the landlord is, that he will renew; but if he refuses there is a penalty; in such cases the party may elect to have a specific performance of the covenant.

I am sure the counsel who made the objections on the ground of fraud, would not have made use of them, if he thought he had other sufficient ground; so that the argument of fraud implies a want of something more material to rely on.

It is said the lease is gone for want of a surrender; which may as much be supplied by a court of Equity as a renewal decreed. It is said the bill is not framed for it,

but where a party comes into a court of Equity, and states his whole case, praying the aid of the court, the court will not sit idle, but will decree the party that relief which is suited to his case. It is because the term is gone at law, that it is necessary and proper to come into a court of Equity, and upon that ground the court will afford relief.

It is because the term is gone at law, that it is necessary to come into a court of Equity.

It is said a case came before me of *Freeman* v. *Boyle*, on this very covenant, in which I refused relief. I do recollect that determination: it was on the 10th of June, 1780; the time is particular; the reversal of my decree in *Murray* and *Bateman* was in 1779: in June 1780 no bill on this subject was even brought into parliament; nor did any man know that such a bill would ever have been brought in; I find by the Journals that it came up from the Commons the 14th of August, 1780, and received the royal assent the 7th of September. The lease being forfeited, it stood as if all the lives had dropped, so came within one of the cases put by the Lords in that of *Murray* and *Bateman*; so, as the equity stood then, it was the equity of the land; I could make no other decree. But though the act had never passed, after the appellate jurisdiction had been restored to this House, I should have very little doubt of making the same decree that I had made in *Murray* and *Bateman*; for then it would have come before judges acquainted with the usage of the kingdom, and the circumstances of this kind of tenure.

It is said the determination of the court of Exchequer, on the plea side, on this covenant in the case of *Lessee of Freeman* v. *Boyle*, contradicts their opinion upon it on the equity side in this case. It is said they decided in that case that the tenant, after the landlord had refused to renew, had an absolute interest at law for the residue of the term, which supposes that the landlord had it in his option to renew or not; but that their decree here is founded on the principle that he had no option, but was bound to renew. But see what that case on the law side was: I am informed that it was an ejectment on the title, brought by the tenant against the landlord, who had got into possession: the defendant demurred to the plaintiff's evidence; the barons thought that it was sufficient to go to a jury, to shew that there had been a surrender within the time prescribed by the condition, or that the landlord had prevented it, they accordingly over-ruled the demurrer. I think they decided very properly; they then sat as a court of Law; but when it comes into a court of Equity, and they see that in fact no

surrender had been made, and have all the circumstances laid before them, they very properly supply the want of a surrender, and decree a renewal; so that they acted very consistently with their judgment on the law side.

If a lease for years were made, and nothing said about lives, I do not think that it would come within the act; but if a lease were made for 31, 99, or any number of years, though not depending upon lives, if it were renewable for ever, I think it would come within the *old equity*.

In my opinion the barons in this case have acted very properly; I therefore think that the decree should be affirmed.

Septennial fines more than an adequate compensation at their establishment.

Lord *Pery*—I concur with the noble viscount in every point, except in this, that the equity of the tenant to have relief is a *local equity*. It is a general principle of equity, to relieve against a mere lapse of time. But as the landlord suffered an injury by the tenant's neglect to renew in time, it was necessary to make him compensation. The only difficulty was in settling what that compensation should be. That of septennial fines, established by Lord Chief Baron Gilbert, was more than adequate; for at that time the price of an annuity for life was ten years' purchase. The decree in that case was affirmed by the Lords of England, and by numerous determinations afterwards that rule was established as the law of this land. I cannot help expressing my surprise, that in the case of *Murray* and *Bateman*, the Lords of England should overturn the known settled law in such cases. That decision made it necessary to pass the Tenantry Act, to prevent the confusion that was likely to arise in this kingdom from that determination. That act was a very proper one at the time, but as the jurisdiction is now restored to this house, it is now unnecessary.

Lord *Earlsfort* coincided with the learned viscount on the woolsack. His lordship observed, that this case afforded an opportunity to that House of priding themselves in the consideration that, if the appellate jurisdiction of this kingdom had remained in its original and constitutional situation, there would have been no occasion to pass the Tenantry Act. That from the determination of that great man, Lord Chief Baron Gilbert, in the case of *Sweet* and *Anderson*, down to the reversal of the decree in *Bateman* and *Murray*, persons having such leases were considered to have perpetual interests, and not depending on the strict terms of the renewal clauses. The leases then under

their lordships' consideration, had been always so considered by the parties, and the proviso and covenant in it, as a covenant for perpetual renewal. His lordship said, that the proviso and covenant, however perplexed, seemed nevertheless capable of a rational construction. The meaning he took to be this, that the tenant should apply for a renewal within one year after the fall of a life; and for that purpose, tender a surrender of the old lease, together with the draft of a new one: that as this time was allowed to the tenant, so on the other hand, the landlord was to have three months to execute the renewal; and if he did not, then the surrender was to become void, that the tenant's interest might not be prejudiced by it, but continue under the former lease, as if no surrender had been made; so that his legal estate not being divested, he might be left to seek a renewal, standing in the same situation as if he never had made a surrender.

Lord *Farnham* declared his concurrence, and reprobated the reversal of the decree in *Murray* and *Bateman*. He observed, that the lords of England had not the excuse to plead that they were ignorant of the established law of this kingdom in such cases; for they had themselves ratified and confirmed it in *Sweet* and *Anderson*, and many subsequent cases, which had come before them.

Decree affirmed.

Decree affirmed. 1 *Ridg.* P. C. 384. This case is also reported in *Vern. and Scriv.* 142.

Observations on Boyle *v.* Lysaght.

Opinion of Lord Lifford that the term's being at an end is out of the case in consideration of a court of Equity.

Observations on the Case of Boyle v. *Lysaght.*

The point in this case on which it is most important, in the present state of the law, that the student should fix his mind upon, is, the bearing of this case on the question, whether the tenant be relieveable in equity after all the lives have been suffered to drop; that is, after the legal term is gone. In reference to this question, it is important to observe, that Lord Lifford *in this case* uses the following words: "*I do not deny, that at law, the term may be gone;* but it is admitted at the bar, that upon a bill properly framed, a court of Equity could supply the want of a surrender; so that it is a case where a court of Equity could relieve. There is in the bill a prayer of general relief, and a court of Equity will adapt its relief to the circumstances of the case; it would consider the tenant as much relieveable by supplying a surrender, as by decreeing a renewal

in common cases. *As to the term's being at an end, it is quite out of the case, in consideration of a court of Equity.*" And again: "It is said the lease is gone for want of a surrender; which may as much be supplied by a court of Equity, as a renewal decreed. It is said the bill is not framed for it; but where a party comes into a court of Equity, and states his whole case, praying the aid of the court, the court will not sit idle, but will decree the party that relief which is suited to his case. *It is because the term is gone at law, that it is necessary and proper to come into a court of Equity, and upon that ground the court will afford relief.*"

These opinions seem so variant from other opinions expressed by Lord Lifford in his judgment on the following case of *Magrath* v. *Muskerry*, that it is necessary to fix attention upon them, and to hold them in view during the examination of the case that follows, in order to see how far the opinions of the same Chancellor on the same point, (namely, whether a tenant is relieveable in Equity after all the lives drop) can be made reconcileable, or satisfactorily distinguished in respect to these two cases.

Variant from his opinion in Magrath *v.* Muskerry.

The determination of this question is now the more material, because the previous opinion in respect to it, (namely, that courts of Equity would relieve in cases where all the lives were dropped, as much as if one life had remained,) has been in some respect unsettled by some opinions of Lord Eldon, lately expressed in his judgment on the case of *Fitzsimon* v. *Burton*. *Vide post.*

The opinion of Lord Lifford on this subject, as extracted from this case, *Boyle* v. *Lysaght*, seems to accord with his own judgment in the preceding case of *O'Neil* v. *Jones*, in which he had decreed a renewal to the tenant, although all the lives had dropped. The succeeding case of *Magrath* v. *Muskerry* seems to the Editor to be at variance on this important point with *Boyle* v. *Lysaght*, and *Jones* v. *O'Neil*: but as Lord Lifford labours much in the case of *Magrath* v. *Muskerry* to reconcile his opinions on those three cases, it may be proper in the Editor to avoid further to anticipate the argument on this subject, until the three cases are before the reader: thus much however he has felt it necessary to notice, in order that the reader might previously be put in possession of the leading object with which, in his view, the following case should be perused and examined; that is, how far the tenant's right to relief in equity is altered by the circumstance of *all* the lives being dropped, or of one life still remaining.

May 5, 1787.

Gamaliel Fitzgerald Magrath, Appellant.
Rt. Hon. Lord Baron Muskerry and others, Respondents.

In this case 1st. as coming under the decision of the lords of Gt. Britain in Murray *v.* Bateman, and within the proviso in the Tenantry Act.

2dly. In conformity to a decree of the Exchequer, wherein it was held, that after the fall of all the lives, the tenant had no right to a renewal.

3dly. Upon the ground of the tenant's misconduct, appellant's bill for a renewal was dismissed in Chancery.

That decree affirmed in the House of Lords.

Negative proviso.

The appellant on the 30th June, 1775, exhibited a bill in Chancery against the respondent, then Sir Robert Tilson Dean, Bart. which was amended on the 12th February, 1777, and again on the the 14th February, 1783, setting forth, that by articles dated the 10th April, 1712, it was agreed that Thomas Dean, Esq. in consideration of £200 to be paid to him by James Butler, should demise to him the lands of Ballyneety, Clogheer, and Ards, in the county of Limerick, for three lives, with covenant for perpetual renewal, at the yearly rent of £5 per acre, a fat hog at Christmas, and half a year's rent as a fine upon each renewal. This rent being thought too high, Thomas Dean afterwards agreed to reduce it to a gross rent of £65 yearly, and the renewal to £20. Notwithstanding this statement, James Butler declined to perform the agreement, and Thomas Dean preferred a bill in the Exchequer to compel a specific execution; and on the 20th November, 1713, he obtained a decree, and it was referred to a Baron to settle the draft of the lease; in consequence of which Thomas Dean, by indenture bearing date 19th November, 1714, demised the lands to James Butler, his heirs and assigns, of the lives of Jordan Butler, Henry Butler, and Daniel Webb, and the lives of such other persons as should be thereafter nominated, in the place of the *cestui que vies* then in being, or thereafter to be nominated, subject to the conditions and limitations therein mentioned, at the clear yearly rent of £65 and a fat hog at Christmas, or £10 in lieu thereof: and the said Thomas Dean, for him, his heirs and assigns, covenanted with the said James Butler, his heirs and assigns, that he and they would at all times for ever thereafter, within twelve months after the fall of every of said lives respectively, or the lives thereafter to be named in the place of the deceased lives, renew the said lease for the then surviving *cestui que vies*, and for the life of such other third person as should be nominated, upon payment of all rent and duties in arrear, and a renewal fine of £200. There was also a negative proviso, that if ever the said James Butler, his heirs or assigns, should without lawful impediment, fail

for twelve calendar months after the fall of any of the *cestui que vies*, then or thereafter to be nominated, which shall first happen to die, to name another life in the place of the life so dying, and to pay or tender the renewal fines, and all rents and duties then due, then the said Thomas Dean, his heirs and assigns, shall not at any time afterwards be obliged to renew, and the lease then in being shall continue, without further renewal, only during the life and lives then in being, and no longer; and that from the death of the survivor of them, that lease and all others made in pursuance of the covenant for renewal, and every clause, article &c. therein contained, notwithstanding that covenant shall from thenceforth cease, determine, and be utterly void to all intents and purposes.

In 1721 James Butler mortgaged his estate in those lands to William Tubbs for £500, after which Jordan Butler, one of the *cestui que vies* died; and in Easter term 1724, Tubbs, the mortgagee, filed a bill against James Butler and Thomas Dean, for an account and foreclosure as against the former, and for a renewal against the latter. On the 4th July, 1727, he obtained a decree, under which the premises were sold for £1880, and by deed the 16th and 17th March, 1726, conveyed to William Nash, who had purchased in trust for Terence Magrath the appellant's grandfather. Thomas Dean, by indenture dated 23d September, 1720, in consideration of the fine, and in pursuance of the covenant, renewed the lease to Terence Magrath, by inserting the life of James Butler in the place of Jordan Butler. In 1731 Terence Magrath mortgaged the premises to Mary Pocklington for £1000, and the mortgage was afterwards assigned to Judge Marshall, to whom the lease, renewal, and all other deeds relating to the mortgage were handed over (as the bill charged) and continued in his possession, till his death in 1774, when they got into the hands of his representatives. In 1738 Terence Magrath, upon the marriage of his son John with Elizabeth Fitzgerald, executed a deed by which the premises were limited in strict settlement. In 1740 H. Butler, one of the original *cestui que vies*, died, and Matthew Dean, who had then the reversion, by an instrument dated 7th October, 1741, acknowledged the receipt of the renewal fine and the nomination of John Magrath, and renewed the lease for the lives of James Butler, Daniel Webb, and John Magrath, subject to the former covenants, rents, &c.

Death of the *cestui que vie.*

Terence Magrath died in July, 1743, when his son John became seised, James Butler, one of the *cestui que vies*, died on the 5th February, 1761. John Magrath, the tenant, another of the *cestui que vies*, died on the 4th January 1770; and General Daniel Webb, the last of the *cestui que vies*, died on the 4th December, 1773. The appellant, upon his marriage with Elizabeth Quin, 16th December, 1774, in consideration of the marriage, and portion of £4000, conveyed the lands to trustees in strict settlement. On 6th June, 1775, an ejectment on the title, brought by the respondent, was served, and on the same day the appellant nominated to the respondent three lives to be inserted in a renewal, and proposed to pay him renewal fines with interest, delivering at the same time an estimate of the fines and interest, amounting to £108 4s. and the names of the lives. The respondent refused to accept the fines and make the renewal, considering the lease as forfeited. In consequence of this refusal the bill was filed, praying a renewal of the lease and an injunction. To excuse the laches in not renewing, it was stated that appellant's father was infirm, and incapable of transacting business, being afflicted with the gout and palsy for many years before his death, and that afterwards appellant was ignorant of the lives, not having the deed in his possession.

On the 21st July, 1775, the respondent applied for a *dedimus* to take his answer, without the plaintiff's obtaining an injunction, when it was ordered, that upon the appellant's giving judgment at law, and paying the rent one half year under the other, pending the cause, and giving security for the mesne rates, an injunction should be awarded until the hearing or further order; and it was ordered that the appellant should speed his cause. In pursuance of this order, the appellant gave consent for judgment on the ejectment, which was accordingly entered as of Trinity term, 1785. On the 10th May, 1776, the respondent filed his answer, admitting that he refused to renew, insisting that he was not bound to do so, and that he caused the ejectment to be served before the appellant nominated the lives, or offered to pay the fines. The appellant replied without delay, and the respondent rejoined. But the appellant having neglected to proceed further in obedience to the order of the 21st July, 1775, the respondent, on the 13th December, 1779, applied for liberty to proceed on the ejectment, and it was ordered that he should be at liberty to do so, unless the plaintiff should comply with the

terms of said order during the then seal, or shew that he had paid his rent in pursuance of it. The appellant neglecting to comply, on the 27th July, 1780, it was ordered that the respondent should be at liberty to proceed upon the judgment without further motion, unless the appellant should comply with the order of the 21st July, 1775, in a month. The appellant neglected to comply, and the respondent issued an *habere*, and on the 7th September, 1780, was put into possession. In October following the appellant proceeded to examine witnesses, as did the respondent also, and publication having passed, it appeared that a witness for the appellant deposed, that John Magrath for several years before his death was sickly, being afflicted with the gout and palsy, and was inattentive to his affairs. But on the other side two witnesses deposed, that though John Magrath was almost constantly afflicted with the gout, yet he was perfectly capable of transacting business. With respect to the possession of the deeds, Sir William Osborne (who was heir at law, and sole executor of Judge Marshall) deposed, that he believed the appellant could not produce to him the original lease, or any part of it; for that said lease, or a counterpart thereof, was in his the deponent's house in Dublin, as he believed, having been found among Judge Marshall's papers, and that it has been in deponent's possession or power six or seven years, and that it was in Marshall's possession several years before his death, into whose hands it had come as mortgagee. It appeared also, that the appellant was twenty years of age in 1770, when his father died.

The cause was heard* on the 8th, 12th, 14th, 15th, and 16th July, 1783. On the 24th November, 1783, the Chan-

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* Previously to the hearing before the Lords, the appellant prayed by petition, an order that his deeds and papers, necessary for the hearing, and which had been in the possession of his late attorney then deceased, should be produced at the bar of the House upon the hearing. He did not pray that they should be delivered up to him. In answer to this petition, the executrix claimed her right to withhold them until the appellant had paid, or given security for the amount of the bills of costs due to her husband. Mr. Attorney-General (Fitzgibbon) was heard in support of the petition, but it was refused, as it sought to deprive an attorney of the lien upon his client's papers. *Vide Marsh* v. *Bathoe. Hardw. ca. L. and E.* 256.

A client cannot compel the executor of his attorney to produce his papers, &c. in court, though only for the purpose of using them there and not to take them out of the executor's possession, without paying the costs due.

cellor dismissed the plaintiff's bill with costs, to which decree the appeal was brought in 1787. It was said on the part of the appellant that the decree ought to be reversed:

First. Because the appellant's case is a case of mere neglect, unaccompanied with any circumstance of fraud or dereliction, and in every such case the tenant has been deemed and adjudged entitled to a renewal upon the terms of making compensation to the landlord, according to the mode of compensation adopted and established in this kingdom for more than half a century.

Secondly. Because said lease has been settled to make a provision for appellant's family, and is a security for creditors, most of whom must be utterly ruined if advantage shall be taken of such neglect, and therefore appellant's case is within the true meaning and spirit of the act of Parliament made in this kingdom in the 19th and 20th years of the reign of his present Majesty, entitled, An Act for the relief of Tenants holding under Leases for Lives containing covenants for perpetual Renewals.

Thirdly. Because, independent of the provisions of the said act, the appellant has an original equity to be relieved against any forfeiture which may have incurred, by reason of the want of a strict compliance with the terms of the covenant of renewal contained in the said lease, inasmuch as the said lease was not in his possession, and therefore he was not, nor can he be supposed to have been conusant of the lives named in the said lease, consequently the failure in a strict compliance with the terms of the said covenant, has arisen from accident and fatality, and such failure under these circumstances, is upon the known and established rules of equity, relievable upon the terms of adequate compensation.

For the respondent it was said the decree ought to be affirmed.

First. Because the respondent had commenced a suit for the recovery of the said lands, and had obtained a judgment at law in the year 1775, and therefore the present case is expressly within the saving or exception contained in the act of Parliament made in the 19th and 20th years of the reign of his present Majesty, entitled, An Act for the relief of Tenants holding under Leases for Lives, containing covenants for perpetual Renewals, whereby it is enacted, "that nothing therein contained should in any sort affect any judgment or decree which was then already given or made, or any suit, which was commenced before the 15th

May, 1780, and which was depending at the time of making said act." And it is conceived to have been clearly intended, that after the tenant had suffered his whole legal estate to be divested, and after the landlord had asserted his right to the possession, and after such possession had been actually transferred, such a case ought to be distinguished from the cases within the general contemplation of the legislature, and ought to be excluded from the benefit of the said act. And it is further conceived, that although the judgment at law was obtained by consent of the appellant, yet it was and must be considered as an adverse judgment, and certainly within the saving, inasmuch as the appellant was compelled to give such consent, by the order made in 1775, and the respondent, after much opposition and litigation on the part of the appellant, obtained on a very adverse motion in the year 1780, the order whereby he received the benefit of the judgment.

Secondly. Because no renewal was ever demanded from the year 1741 till the year 1775, during which period all right of renewal was three times forfeited, viz. after the death of each of the lives, by omitting to comply with the proviso contained in the lease. And it is submitted that such proviso ought to be considered as an essential and indispensable part of the agreement, not only because it was declared to be an express condition of the demise, but also because it was deliberately framed by Baron Echlin, on a reference to him by the court of Exchequer, and was afterwards solemnly approved or debated by the whole court, for the purpose of restraining the spirit of litigation which the original lessee had evinced in the cause which was then depending before the said court.

Thirdly. Because the appellant and his father, under the circumstances before stated, must be presumed consant of the lives named in the said lease; and of their respective deaths, and such a concealment by them of the said deaths, and such an omission to renew for the space of thirty-four years, must be considered either as a plain desertion of the said agreement, or as a fraud upon the landlord, and consequently cannot be relievable by the ancient equity of this kingdom.

Fourthly. Because although the appellant has attempted to account for the laches, yet he has manifestly failed in such attempt. This therefore appears to be a case at least of gross and inveterate neglect, without any extenuation or

excuse, and it never was the practice to relieve against that *crassa negligentia quæ equiparatur dolo.*

Fifthly. Because such neglect is further confirmed and explained by the conduct of the appellant after filing his bill, in omitting to give security as required, in withholding his rents, and in obstinately delaying to speed his cause.

Sixthly. Because it does not appear that the appellant, before the filing his bill, or at any time since, tendered to the respondent the renewal fine, or the arrear, as required by the covenant in the lease.

Lord *Chancellor.* My Lords, I rise rather to furnish your Lordships with the principles which governed me in making my decree, than to offer any argument to induce you to affirm it. It is perfectly indifferent to me which way you decide. I am not at all anxious about the fate of any appeal from a decision of mine. On the contrary it is a great consolation to me, when sitting on the bench, to reflect, that if I decide wrong, there is this House to rectity my mistake. The wisdom of this House is superior to that of any individual, though sitting in his judicial capacity, and therefore ought to be exerted without any influence from the opinion of such individual. A great deal has been said at the bar, which, in my opinion, does not meet the principles upon which I founded my decision. As to this lease having been founded on a decree of the court of Exchequer, that makes no difference. The manner in which it is formed is a circumstance which shows, that the court had not then the same opinion of these negative covenants, that has been held in more modern times. The Baron who framed it, certainly thought that the negative proviso was to have an effect, and the decree was made accordingly. But in the cases that have occurred since, courts of Equity do not seem to have much regarded those negative covenants, but only to have looked to this, whether compensation could be made to the landlord, and whether the tenant had not misbehaved. This is a very particular case; and the question arising upon the act, and the circumstances of the times, is very serious and of great importance, and which weighed very much with me in my determination. I looked into it, first with a view to the Tenantry Act, where the first consideration is, how Lord Muskerry was circumstanced at the time of passing that act, on the 7th September, 1780. Then all the lives were gone; Lord Muskerry had therefore brought an ejectment on the title, obtained judgment, gotten execution, and was on that very day in possession of the lands under his title

Negative covenants in renewable leases not much regarded in equity.

as owner of the inheritance. Under these circumstances he was within the proviso of the act. That act was made to relieve tenants in cases of mere neglect, and it is provided that it should not affect any judgment or decree at that time given or made, or any suit instituted before the 15th May, 1780, and then depending for the recovery of the possession on account of any lease not being renewed, &c. Here Lord Muskerry had not only instituted a suit, but had ordained the fruit of it, he had gotten judgment and execution.

If the tenant have no title, he must consent to a judgment, else the landlord will not be delayed till the event of an equity suit, because his witnesses might die in the mean time.

The law had performed its office. Here (if it could be doubted) it may be proper to consider an objection that has been made. It is said, that it was not an adversary judgment: that the proviso in the act means only adversary judgments. It is also said that the order, under which the judgment was had, was such as never had been made; such as ought not to have been put upon the party, and such as this house would have relieved against. I think there is no foundation for that assertion. Lord Muskerry had brought his ejectment. The tenant had no title whatsoever at law. The landlord ought not to have been delayed at law; and where the tenant cannot make title, the court in every case will give the landlord leave to go to trial, unless the tenant will consent to give judgment; for if the landlord is to be delayed till the event of a suit in equity, his witnesses may be dead; he may not be able to prove that which he could have proved before. The defendant at law, Magrath, filed his bill. There was a motion for a *dedimus* without an injunction. It was offered by the counsel for Magrath to give judgment at law, to pay the rent in arrear, and give security for the mesne rates, to speed the cause. The defendant accepted the offer, and the court did no more than is done in such cases, and an order was made accordingly, by which the plaintiff at law was stopped from going to trial by an injunction, and the defendant having no title at law, gave judgment, and entered into the terms proposed by his counsel. This was not like cases of ejectment, where the tenant can make a title; and such an order as this, is agreeable to every day's practice. This is the order that has been arraigned, and which it is said would have been relieved against. I will be bold to say, that it would not. It is said that the judgment was not an adverse one, and that the act means an adverse judgment. Now let us examine that matter. How did Lord Muskerry begin? He brought an ejectment for the

recovery of the possession, and to turn the tenant out of possession, because he, the tenant, had no title. Is that a friendly action? It began adversely; nothing could be be more adverse. It is said, the judgment was by consent, and in consequence of an order, and therefore not adverse. It is not very material as to this point whether it was by consent or not. But the consent was the consequence of an adverse suit, and the judgment was to be made use of in an adverse manner, if the tenant should not comply with the terms imposed on him. If he had not given the consent for judgment, the court would not have prevented the landlord from proceeding at law, and the consequence would have been, that he would have obtained judgment and gotten into possession, perhaps much sooner than he did. To avoid this, the tenant entered into terms offered by his own counsel and which were the terms on which he was to keep in possession. It was fair on both sides. Judgment was given as of Trinity term, 1775. It was to put the landlord into possession if the tenant should fail in complying with the terms. He failed in every particular, except in giving judgment, and that he could not help. He did not pay the rent, nor give security, nor speed his cause. In my opinion a tenant, who expects assistance from a court of Equity, should shew himself ready to comply with its orders, and perform his own undertaking. On the contrary, by litigation and various manœuvres, he delayed Lord Muskerry for five years, till the year 1780, till then he never examined his witnesses, though he had but two to examine. What did the respondent do? On the 13th December, 1779, he obtained an order that he should be at liberty to proceed on the ejectment, unless the appellant should comply with the terms of the former order, during the seal, or shew that he had paid his rent. Of this the tenant took no notice. On the 27th July, 1780, Lord Muskerry obtained an order, that he should be at liberty to proceed at law upon his judgment, without farther motion, unless the tenant complied with the terms in a month. The terms were not complied with, execution was sued out and possession was delivered on the 7th September, 1780. Surely the judgment then became adverse. Thus the matter stood when the act passed. Here your Lordships will take notice of something very particular. Lord Muskerry had not only instituted a suit, but he had gotten the fruit of it, and got into possession the very day on which the act passed; so that Lord Muskerry and his

A tenant seeking aid from a court of Equity should be ready to comply with its orders and perform his undertakings.

case were clearly within the exception, and the tenant could have no benefit under the act, as it seemed to me. Now let us consider how far the appellant could have relief, if the act had not passed. And here it is said that the Lords of England would have given relief; whereas, if I know any thing of the matter, they most certainly would not. At that time the *dernier resort* was in the Lords of England. The last determination there on this subject had been in the case of *Murray* v. *Bateman*, and that had declared the equity of the land in the point.* For when the court of *dernier resort* pronounce what is the law or equity in any case, it so far fixes the law or equity in the point, that all inferior courts think it their duty to submit to it.

The present case is infinitely less favourable for the tenant than that of *Murray* v. *Bateman*. That was very particularly circumstanced. In that case there was such a proviso, covenant and deed, as one shall scarcely ever meet with. The deed was made in the manner and form of a fedoffment, the word *infeoff* is in it. It considers it as an absolute conveyance, though it afterwards assumes the shape which gives it the qualities of a lease. Lady Ross and her husband had lived abroad, and returned to Ireland a very short time before the application was made for a renewal. This application was refused on this ground: Lady Ross insisted that her father had purchased the tenant's interest: and this was insisted on so seriously, that an issue was directed to try that fact, and it was found against her, and then she set up the defence, that the right of renewal had been forfeited. So that was a very strong case, and very few cases in my opinion, have occurred so favourable for the tenant. Notwithstanding which the Lords in England declared that there could be no renewal, and accordingly reversed my decree. In the present case all the lives had dropped. One in 1761. No application! Another in 1770. No application to renew! Though the tenant was then twenty years of age. Nor the least notice taken until Lord Muskerry had brought an ejectment in 1775. I have a pretty long list of cases determined upon this subject; about thirteen. And when you minutely look into them, you will find that there was scarcely one in which the neglect was not in some degree accounted for. In all of them attempted.—In one case, of *Kane* v. *Hamilton*, 1776, it was particularly stated that leases for covenants for perperpetual renewal, were very common in Ireland; that a

* Sed vide post.

great deal of property was held under them, and that though it often happened that the tenants neglected to renew, yet the constant practice of the courts in Ireland had been to fill up the lives *during the continuance of any one of them.* That idea prevailed in the case of *Ryan* v. Lord *Clonmore*, which I shall presently mention. It is my firm opinion, and it was at that time, that Magrath could have no relief. Lord Muskerry continued in possession under his old title, from the year 1780, near two years, till 1782, when the jurisdiction of this House was restored. He stood possessed, discharged, in my apprehension, of all equity, as matters then stood, and had gained an absolute title, an absolute interest in the estate. In 1780, the tenant was not within the act, and the equity was all that time against him. Here now we must look at the act, and ask this question: was it ever thought of that it should change the right, and give a man a title which he had not before; in an instant take away the landlord's title, and transfer it to his tenant? The exception left the tenant to the equity he then had. Then I say he had none. Lord Muskerry, were this appeal to prevail, by holding the land, would, instead of being the absolute owner, be made an accountable tenant, not only for the rent, but for what he might have made of the land. What would then be the condition of the landlord who gets into possession? If he be to be made accountable for three years, why not for seven? why not for ten? where is the equity to end? The tenant lets him stay in through vexation, and when he pleases, will file a bill to turn him out. Such an idea makes one shudder at what may be the consequences of the determination sought for by this appeal. Suppose in that time Lord Muskerry had wanted to settle or mortgage his estate, and the title deeds had been laid before counsel. His title would be, under this judgment and execution, according to the old title. The counsel would see whether there were any equity in the tenant; and upon this point, he would have looked into the case of *Murray* v. *Bateman*, and then Lord Muskerry's case coming within that decision, and being excepted out of the act, he could have no apprehension of any title in the tenant from this lease. It being excepted and subject to the determination of *Murray* v. *Bateman*, could he doubt of it? No one could then see that the jurisdiction would be restored to this house. Even when the great work of restoring the constitution was in agitation, no man knew that the jurisdiction would be restored to this house, and I know many that would have been

pleased if it never had. They were satisfied with that jurisdiction remaining where it was. Who then could foresee, that there would be no occasion for the statute to restore the old equity of the land? But to proceed: this is a great and solemn point, and if it were to be decided in the way contended for by the appellant, it would work a great mischief. But it is said, the exception left those cases to the old equity. I say it left them to the equity that existed at the time of passing the act. At that time the tenant had no equity which would give him a renewal either in England or in Ireland. This was one of the principles upon which I laid weight. But soon after the act there was a case in the Exchequer, *Ryan* and Lord *Clonmore*, which was a very remarkable case, and weighed much with me. There a bill was filed for a renewal of two leases. The owner had mortgaged to Pilsworth, who filed a bill for a renewal. It was found, that there was a non-alienation clause, and that another tenant had been put in upon the landlord without his consent. When the court saw this, they dismissed the bill *in toto*. Then a bill was filed by Ryan, the mortgagor; says he, I am under different circumstances from Pilsworth; I am the original proprietor, not a stranger. I am entitled to a renewal, for I stand perfectly clear of the objection from the non-alienation clause. The court saw that in one case all the lives were gone, that in the other, one was still remaining. Accordingly, in conformity to what was laid down in the House of Lords of England, that where one of the lives was still in being, *there was a legal estate for the equity to attach upon*, they decreed a renewal of the latter, but dismissed the bill as to the former. That case determined, that if all the lives were gone, the tenant was not entitled to a renewal; if there was one remaining, he was. Therefore exclusive of any other reason, it would have been sufficient for my determination, that all the lives were gone. If I had determined otherwise, it would be in direct contradiction to the determination in the Exchequer; and what were the people of this country to do, if one court of Equity were to decide contrary to the other? Uniformity of decision is of the greatest importance. That case in the Exchequer underwent the greatest deliberation, and every case of renewal that had been determined was cited. All the cases I have here, I have extracted from the notes of that case of one of the Barons. I never saw a case where more pains were taken, more judgment and ability shewn

in distinguishing the several cases; and therefore that determination had the greater weight with me, that I might preserve an uniformity in the decisions of the two courts. Among other cases was that of *Mansell* and Lord *Blessington*. There there was a disability in the lessor or his son to execute a renewal until the bill was filed, and the defence made to it was, that the lease was void.

Another case was *O'Hara* v. *Burke;* there the lessor had not only sold the inheritance, but the renewal fines, subject to the tenant's right in express words. It was said in the decision that there could be no fines without a renewal, and therefore the purchaser took subject to the renewal by the bargain. Another case was that of *Jones* v. *O'Neil.* There was a great difference between that and this, in favour of the tenant. There there was an absolute agreement to renew. The lapse was waived. The new lease had been engrossed, and read over, and the fine was proved to have been actually paid to the agent, who afterwards failed in his circumstances. Mr. Jones went to Armagh, where he broke his leg, and Mr. O'Neil's father died before the return, otherwise the renewal would never have been executed. Another thing which weighed very much with me, was the consideration of what the act intended to relieve against. It relieves in cases of mere neglect, where there is no fraud, unless there had been a demand and refusal, which is made at the bar the definition of dereliction. But I think, gross, wilful, obstinate, and contentious neglect on the part of the tenant, is the proper definition of dereliction. Here the appellant's father neglected to renew. It does not appear that he ever called for a renewal. It is said he did not know who the lives were. Where does that appear? No where. Sir William Osborne deposed, that he believed he had seen the lease among Mr. Marshall's papers after his death. It is made an inference from thence, that the father did not know who the lives were. The evidence was so slight that I thought there was no ground for that inference. The son did not offer to renew till Lord Muskerry brought his ejectment in 1775, and then he thought fit to come and renew. That might have been mere neglect. But let us look to his subsequent conduct to explain it. After Lord Muskerry had put in his answer, the tenant did not comply with the terms of the order, which, as hath been said, was such an order as every court of Equity would make in similar cases. It was not consonant to a desire to renew, to lie by

so long. He did not proceed until five years afterwards, when Lord Muskerry obliged him to examine his witnesses. He then examines two. Does he then proceed? No, he delayed again until Lord Muskerry had been in possession three years, and then in 1783 he endeavours to make Lord Muskerry his tenant, and prays that he shall account to him for the profits during the time he was in possession. If you reverse this decree, the determination of the court of Exchequer in *Ryan* v. *Lord Clonmore* cannot stand. That decree after possession for a length of time under it must be set aside. If a tenant can behave as the present appellant has, in what light does he appear? Does he shew that fair conduct which he ought? Or is he not rather a litigious man, who is desirous to keep his landlord out? This is either a dereliction, or a gross misconduct, and amounts to fraud, which is to be taken into the consideration of a court of Equity. We ought to consider what the consequence of the decree prayed would be. A tenant after giving jndgment by consent, may permit his landlord to stay in possession for a number of years. If he have a right to renew afterwards, the landlord cannot set the land; but the tenant will come and say, "after having been so long without your rent, and unable to set your land to another, you shall account to me for the profits you might have made, and then you will have money to pay me, instead of my having it to pay you;" and so is the prayer made here at the bar; it is that Lord Muskerry may account for the profits, and that the fines may be deducted. There is no doubt as to the general doctrine, that where compensation can be made, and every thing has been fair, and the tenant has done equity for equity, there ought to be relief. On these grounds, first, on the grand point; secondly, on the propriety and necessity of preserving uniformity of decision; and lastly on the misconduct of the tenant, I formed my decree. If I have been wrong, it is a consolation to me that my mistake will be rectified.

Where compensation can be made to the landlord and the tenant has been fair, he shall have relief.

Lord Pery. My Lords, I shall first mention to your Lordships what are the principles that govern cases of this kind, as they were laid down on a former day by the noble viscount in the case of *Boyle* v. *Lysaght*, and in which I most heartily concurred. They were these, that courts of Equity ought in every such case to relieve against lapse of time, where compensation could be made to the landlord, provided nothing appeared that shewed fraud, gross ne-

Equity relieves against lapse of time, where compensation can be made and there is no fraud.

The fine is the chief object, and the renewal is only to enforce payment.

glect, or dereliction on the part of the tenant; also that courts of Equity ought to relieve against the forfeiture, because the fine is the principal and essential object, and the renewal is only to enforce the payment. These principles your Lordships can apply to the present case as well the ablest lawyer. It is no more than what juries do every day at *nisi prius.* As to fraud, there is not the smallest circumstance of it. It is said on the part of the respondent, that in the course of thirty-four years, it must be presumed that the tenant knew who the lives were, and when they fell, but concealed it, and neglected to renew. In answer to this, it is to be observed that the lease was mortgaged by the grandfather of the appellant, in 1731, and in the mortgage deeds it is covenanted, that all deeds and other papers should be handed over to the mortgagee. That mortgage is at this day in force, and it appeared, that the lease continued in possession of Mr. Justice Marshall until his death, and therefore that the father of the appellant had never been in possession of it; whence the presumption is, that he did not know who the lives were. But can there be the same presumption in favour of the landlord? the counterpart of the lease was in his possession. If any fraud is to be presumed, it is on the part of the landlord. His not applying to the tenant to renew, is rather a ground to presume fraud in lying by, to forfeiture to incur. That I do not by any means intend to charge upon the respondent, but surely none can be imputed to the tenant. As to the lapse of time, it is said in the printed case that thirty-four years had elapsed without any application for a renewal; see how that time is made up. The respondent would have your Lordships believe that there was a default in the tenant. But the first life did not drop until the 5th February, 1761; the tenant had one year to renew; so there was no default till the 5th February, 1762. The second life, the appellant's father, died in 1770, consequently but eight years had elapsed in the father's time. It was sworn by two witnesses that he was indolent, disordered, and paralytic. One witness indeed for the respondent said that he was only gouty; but be that as it may, there was no evidence to shew that he was guilty of any thing but mere neglect. That no fraud was intended, appears clearly from the covenant in the marriage settlement of 1738, "to renew from time to time." When the father died, which was in 1770, the appellant was under age. By the covenant he had a year to renew. That would bring it to 1771.

From thence to the filing of the bill only four years elapsed, and it did not appear that he had then the lease in his possession; so that no great neglect is imputable to him on the fall of that life. The last life dropped in December 1773. Until December 1774 there was no neglect, and the bill was filed in June, 1775, so that the whole neglect imputable to this unfortunate family is only thirteen years after the fall of the first life, four after the second, and after the third, only six months. There have been many instances where the courts have relieved after much longer neglect. The case of *Munsell* v. *Blessington* I have perfectly in my recollection. I was counsel in it myself; but I nevertheless directed a copy to be taken from the register's notes respecting the dates. The original lease was made in 1692. The fine to be paid on renewal was £500. That was really an object! The first life dropped in 1704, the second, in 1729, and as the noble viscount has stated, the landlords were incapacitated to renew till the year 1732. In that year, Charles Lord Blessington died without issue, and then Lady Mountjoy and her son, afterwards Lord Blessington, had power to renew. In 1736, and not till then, a bill was filed, but no proceedings were had on it. In 1751 the last life dropped, and an ejectment was brought; and then in 1786 a bill was filed five years after the fall of the last life and the bringing of the ejectment. No case could be more litigated than that was, and Bowes, who was then Lord Chief Baron, decreed a renewal upon payment of fines according to the computation established in in *Sweet* v. *Anderson*. That decree was appealed from and affirmed. In that case there had been a much greater lapse of time than in the present. The three lives were all gone before the bill was filed, and therefore it is a strong authority to shew that where all the lives are dropped, courts of Equity can relieve as much as if one life had remained. The noble viscount, to combat this, has cited a decree of the court of Exchequer, and has stated that as to one denomination there was a decree for the tenant, because one life subsisted; and as to another the renewal was refused, because the three lives were gone. I have heard from one who was counsel in that cause, that the determination went on a clause of non-alienation. A bill had been filed by a person who claimed in contradiction to that clause; but afterwards, when the original tenant took a re-conveyance and filed a bill, then the court refused to decree a renewal, because they said the estate was gone,

Equity relieves even where all lives are dropped.

and nothing remained to be re-conveyed by the mortgagee. If the decree had been made on the ground that all the lives were gone, there ought to have been an appeal. It was contrary to a number of cases which have been determined here and ratified in England.

Where the fine is small and the interest valuable, it is a presumption that the tenant would not from fraud risk so much to save so little.

When we speak of the lapse of time, and of the effect of it, let us attend to the value of things, and that will remove every doubt. The fine was only £20, the interest on that at £6 per cent. would be but £1 4s.; the value of the lands is perhaps from £300 to £500 per annum. To think that any man in his senses would risk such a property from fraud, in order to save £20, or defer paying it to save the interest, which is but £1 4s. is absurd. In *Munsell* v. *Lord Blessington*, the fine was an object. Here the sum tendered by the appellant was the utmost that Lord Muskerry could be entitled to. The four fines, with the interest, amount to £18 only, and for that sum the noble Lord seeks to get an estate of about £500 per annum. That ould be cruel to the highest degree.

Arguments have been drawn from the appellant's conduct during the suit. I did not think that this could have been relied on seriously; but let us see what this conduct was: the appellant had made the tender on the 6th June, (not shortly after the service of the ejectment, as is stated in the respondent's case, but on the very day). On the 30th of the same month the bill was filed. So early as the 21st July, the order was made upon the motion of the respondent for a *dedimus* to take the answer. By the established rule of the court the plaintiff is, upon such an application, entitled to an injunction of course, instead of having terms imposed on him. That rule was not in the present case observed. But an order was made upon the plaintiff to give judgment in the ejectment; to pay the rent due; to give security for the mesne rates, and to speed his cause. It was an order for which I cannot see any foundation. If the appellant had applied to the court for any extraordinary favour, it might have been right to put him under terms; but here the defendant applies for a favour which he not only obtains, but the plaintiff is put under terms, which were the cause of all the subsequent conduct, that is now called litigious. That order, if appealed from, I am convinced would have been set aside. But where does this litigious conduct appear? When that order was made there was no ground for that censure. Magrath gave consent for judgment immediately. This was the only thing

he had in his power to do. The other order itself took away his credit; and with it the ability of complying with the other parts of it. With the greatest difficulty he raised the sum of £327, which was five pounds and some shillings short of the rent due; this he paid to the respondent, but security for the mesne rates he could not give, and on that account Lord Muskerry was allowed to take out execution on the judgment. It is said that that judgment is decisive. But I say to this hour it is not decisive. Can it be said that a court of Equity, on hearing the cause, had not that judgment under its control? The order was subject to the court of Chancery, in which it was conceived, and consequently the judgment founded upon it, and both are now subject to the control of this house. I have hitherto said nothing of the Tenantry Act, in order to shew that independent of it the appellant is entitled to a decree. The principle so much relied on is, that the House of Lords in England, being the *dernier resort*, the last determination there establishes the equity of this land. I deny that principle. There can be no doubt that, if there had been then an appeal to the House of Lords of England, the Chancellor would have adhered to his former opinion in the decision of *Murray* v. *Bateman*. But was not the equity of this country as much established by the determination of his predecessors through a numerous succession of cases? Shall it be in the power of one Lord Chancellor to overturn the equity that had been laid down in a series of determinations, and to say, that his decision last given shall establish the equity of the land? That is a doctrine I deny.

It was within the knowledge of Lord Pery that the Tenantry Act was made to remove the impression made by the opinion of Lord Thurlow, in Bateman v. Murray.

Let us now consider the act. It is in the memory of many, and in my own particular knowledge, that that law was framed purposely to remove the impression that had been made by the opinion of the present Lord Chancellor of England, in that case of *Murray* v. *Bateman*. But consider what was then the situation of this country. The *dernier resort* was then in the Lords of England. We stood in a different relation to England from what we do at present. It was necessary to be on a good footing with the Chancellor of England. It was necessary to treat him with delicacy. The act therefore was dexterously and cautiously worded, not to give him offence. It did not impeach his decision as wrong, and contrary to the equity of the land; for then we should have been certain that it would have been thrown out. The history of the proviso is curious. There was no such clause in the bill when it passed the Commons.

History of its proviso.

Great application was made to oppose the bill on both sides of the water. It was usual in England to refer our bills to the Attorney and Solicitor-General, and some of those Attornies and Solicitors'-General have given them over lo a lower class of people, who made a practice of deriving profit to themselves by altering them. This proviso was there inserted no one knows how! but there is not a Lord who hears me, that does not suspect that it was done by private application. It often happens that fraud defeats its own end. Those persons, whoever they were, that procured this proviso to be added to the act, did not know that it would have no operation, at least none that would answer the purpose it was intended. It cannot operate on any part of this act, but such as is introductory of a new law. If it could have any other, and such as is contended for, it would repeal the present equity for so much, and so the legislature who meant to establish the old equity of the land, would in fact have destroyed it. It does provide that nothing therein contained shall affect suits commenced before the 15th May, 1780, that is, supposing it to be a new law; for if it were in force before, suits commenced before that time must have been subject to its operation. It has been said that Lord Muskerry was in possession on the 7th September, at the time of the passing of the act, and therefore that it was conclusive against the appellant. But have I not shewn that the judgment was subject to the order of the court of Chancery, and consequently is now subject to the order of this House? It is said it was an ejectment on the title. True; for had it been an ejectment for non-payment of rent, it would have set up the lease; but be that as it may, the judgment and execution were subject to the order of this House.

It is said that it will be a great hardship on Lord Muskerry if he should be obliged to account for the profits of the land for the time that he has been in possession. Is not that the case of every landlord who recovers under an *habere* for non-payment of rent? Must they not always account for profits, if the tenant choose to redeem? But if there be any hardship on Lord Muskerry, he has brought it on himself by going into possession. This case is clearly within the meaning of the act, and the proviso does not in any sort prevent it, for it affects only that part which introduces a new law; otherwise it would be a repeal for so much.

A motion was made to reverse the decree of the court of

Chancery, upon which the House divided: Contents, 4. Not Contents, 5.

It was then ordered and adjudged, that the appeal be dismissed, and the decree therein complained of affirmed. 1 *Ridg.* P. C. 469, and *Vern.* and *Scriv.* 166.

Decree affirmed.

Observations on the Case of Magrath v. *Lord Muskerry.*

Observations on the case of Magrath *v.* Muskerry.

Lord Lifford, like the great Lord Hardwicke, filled the office of Lord Chancellor during a period of twenty years; and further resembled that first of British judges, although worst of British statesmen, in some of the highest judicial attributes, deep knowledge, stern impartiality, unwearied patience, and unconquerable good humour. By the efforts of such qualities, each of which, however difficult may be its attainment, is yet essential to the duties of a judges; Lord Hardwicke was enabled, during those twenty years in which he held the great seal of England, to record that high pile of equity decisions, which occupied Chancery during that period, in a manner so applauded by cotemporary authorities, that no one of these decisions was ever reversed; and so sanctioned by the test and experience of posterity, that they still and are likely to shine hereafter among the first lights of British equity and jurisprudence.

This non-reversal is an extraordinary distinction, perhaps not unmixed with fortunate accident; few judges have attained it; perhaps none have a right to expect it. In this particular, however, the resemblance fails between Lord Hardwicke and Lord Lifford: the judgments of Lord Lifford, on important cases in reference to this subject of renewals, have sustained reversals in both countries; namely, by the House of Lords in England, when the appellate jurisdiction was there, and the House of Lords in Ireland, when that jurisdiction was transferred or restored to this country. The former case of reversal was *Bateman* v. *Murray*; and the latter *Freeman* v. *Boyle*. Even in the present case, *Magrath* v. *Muskerry*, the Lords who attended the hearing of the appeal seemed to have been divided in their opinions, and almost equally, the numbers on a motion to reverse the decree of Lord Lifford being, Contents 4, Not-contents 5: so that the judgment of Lord Lifford in the court below, was only affirmed by a majority of one, in a case wherein his own vote reckoned one; so that the opinion of the House may be considered as equally divided;

and therefore neutralized in respect to any extra-sanction, which the decree of the Chancellor in this case, could derive from its affirmance by the Lords. Nor can it surprise the attentive reader that such a difference of opinion should exist on a reconsideration of the grounds on which this decree was founded; the principles of which, as stated by Lord Lifford himself on the appeal, appear so difficult to reconcile with the principles laid down by his Lordship in the case of *Boyle* v. *Lysaght*, little more than a month previously.

Contrariety of Lord Lifford's opinions in Boyle *v.* Lysaght, and in Magrath *v.* Muskerry.

The contrariety of Lord Lifford's opinions in these two cases are chiefly referrible to the legal proposition peculiar, but most important to Ireland, namely, whether a tenant, under a lease of lives renewable for ever, has any right to a renewal from a court of Equity, after all the lives have been suffered to drop. It seems to the Editor that Lord Lifford, in his judgment on the appeal case of *Boyle* v. *Lysaght*, expressed an opinion, that under such circumstances the tenant could have a right to a renewal, and expressed that opinion distinctly and repeatedly. And it further seems to the Editor, that his Lordship, within five weeks after, in his judgment on the appeal of *Magrath* v. *Muskerry*, expressed the opinion, that the tenant, under such circumstances, could not have a right to a renewal, and expressed this opinion distinctly and repeatedly.

This variance of opinions in this excellent judge was a matter of surprise and difficulty to the authorities and practitioners of the law in his day; and it is calculated to create a like surprise and difficulty in those days, that the former of those opinions seems to have been entertained judicially by Lord Redesdale; and the latter by Lord Eldon. It is not however so surprising that the two last mentioned Lords should differ from each other, as that Lord Lifford should differ so widely from himself on the same proposition and within such a short space of time.

Opinion of Lord Lifford that tenant cannot renew after all the lives are dropped.

This contrariety of opinion was first suggested by Lord Pery in the case of *Magrath* v. *Muskerry*. The extracts from the judgment of Lord Lifford in *Boyle* v. *Lysaght*, which the Editor in this treatise has annexed to the conclusion of that case, *vide ante*, will shew the opinions expressed by his Lordship in respect to the proposition lately referred to; and the following extract from this case will shew the variant opinion of his Lordship in respect to that same proposition. " Accordingly, in conformity to what was laid down in the House of Lords of England, that

where one of the lives was still in being, *there was a legal estate for the equity to attach upon*, they decreed a renewal of the latter, but dismissed the bill as to the former. *That case determined, that if all the lives were gone, the tenant was not entitled to a renewal;* if there was one remaining, he was. *Therefore exclusive of any other reason, it would have been sufficient for my determination, that all the lives were gone!" vide Magrath* v. *Muskerry*, 1 *Ridg.* P. C. 493. *Judg.* of *Lord Lifford.*

Opinion of Lord Lifford, that he can.

"*I do not deny, that at law the term may be gone*, but it is admitted at the bar, that upon a bill properly framed a court of Equity could supply the want of a surrender; so that it is a case where a court of Equity could relieve. There is in the bill a prayer of general relief, and a court of Equity will adapt its relief to the circumstances of the case; it would consider the tenant as much relieveable by supplying a surrender, as by decreeing a renewal in common cases. *As to the term's being at an end, it is quite out of the case, in the consideration of a court of Equity." Vide Boyle* v. *Lysaght*, 1 *Ridg.* P. C. 411. *Judg. Lord Lifford.*

The unprofessional reader will here observe, that the phrase "term being gone," means, the freehold term under the lease: that is, that all the lives were dropped and years gone, and therefore cannot mistake the meaning of the last mentioned opinion; or the following additional one, from Lord Lifford on the same point: "*It is because the term is gone at law, that it is necessary and proper to come into a court of Equity, and upon that ground the court will afford relief.*"—*ib.* 414.

The proposition in discussion must be now clear to every man, professional or not; namely, can the tenant renew after all the lives are gone: and it must be equally clear that in the former case, Lord Lifford said he could; and in the latter, his Lordship said, the tenant could not. Neither can the Editor comprehend how the enactment of the statute can affect this contrariety of judicial opinion. There was an interval between the reversal of *Bateman* v. *Murray*, and the enactment of the Tenantry Act, within which the law on this subject might have been considered as unfixed; but these two decrees did not occur within that period; they occurred after the Tenantry Act: they could not be influenced by the reversal of *Bateman* v. *Murray*, because they were made after the statute, whereby that reversal was counteracted: they could not be influenced by the

new law enacted by the Tenantry Act, because they were within its exception, as being cases where suit had commenced; therefore they were only within the declaratory part of the statute; that is, within the old equity of Ireland, and altogether unaffected by the statute: therefore the statute affords no solution to the contrariety of opinion suggested by the judgments of Lord Lifford in the cases of *Boyle* v. *Lysaght* and *Magrath* v. *Muskerry*.

It may here be observed that the case of *O'Neil* v. *Jones*, which immediately precedes the case of *Boyle* v. *Lysaght* in this Treatise, and which did precede it in order of time, is an authority in favour of Lord Lifford's first opinion on this subject, decreed by Lord Lifford himself, when the Tenantry Act was then two years in operation; and which case certainly decided, that a renewal could be decreed when all the lives were gone; or as his Lordship expresses it, "when the term was gone." Even the case of *Freeman* v. *Boyle*, which clearly occurred after the reversal in *Bateman* v. *Murray*, and before the Tenantry Act, and wherein the Chancellor's decree was made in that interval; and wherein the three lives were gone, yet this decree of Lord Lifford, although made during that interval, in which, as he says, the reversal in *Bateman* v. *Murray*, might be considered as giving the law to this kingdom, his Lordship's decree in that case was reversed by the Irish House of Lords in the next session after the appeal case of *Magrath* v. *Muskerry*, and therefore becomes the case next in order.

Lord Pery one of the framers of the Tenantry Act.

Lord Lifford was opposed in his judgment on this case by Lord Pery;* an eminent name at that time in reference to the law and the legislation of Ireland; a man who, as Hardy says, was "master of his profession," although he declined to fill any office therein, and well skilled in the duties of legislation, and interests of his country; although

* Edmund Sexton Pery, first Lord Pery, was born in April, 1719, was called to the Irish bar, and shortly after became a member of the Irish House of Commons in the year 1751. He was the leader of what was called, the Flying Squadron, a party attached neither to the Court nor to the Opposition, and occasionally joining both. When acting with the administration he was offered the place of Solicitor-General, which he declined in consideration to his friend Mr. Gore, (Lord Annally,) who then held that place. *He was master of his profession*; and not only that, but an admirable Member of Parliament. It may be justly

he never would accept a ministerial situation. He was, as Hardy informs us, one of the framers of the Tenantry Act; and of course among the best qualified to give just and well founded opinions in respect to the new law which it enacted. He had been elected Speaker of the Irish House of Commons, in three successive Parliaments, in 1771, 1776, and 1783, and of course filled that office at the time when the Tenantry Act was in progress through that branch of the legislature. Mr. Pery, as Speaker of the House of Commons, was far more than its Moderator, or the Master of its ceremonies: his mind, as Hardy remarks, seemed to keep pace with every question, and follow the the debate in all its various forms. In fact his great knowledge of his country and its laws mixed itself with the formation of every statute of great public interest, and contributed to guide, modify, and improve it through its progress. He was acquainted not only with the provisions, but the history of every important statute of those times, and has given us in the case of *Magrath* v. *Muskerry*, the history, and a curious one, of the proviso to that statute. He says no such proviso made part of the bill when it was sent over from this country to England, for the approbation of the British minister, and that that proviso was in all probability foisted in through some private cabal, for some individual interest, by some assisting clerk of the English Attorney or Solicitor-General; who, strange to say, were at that time in the habit of committing such duties to the management of such subalterns.

His history of the proviso thereof.

But this clandestine introduction of the proviso failed to effect the object of its planners: that object doubtless was, to except from the operation of the statute certain cases then in suit, and thus leave them to the operation of that English equity supposed to be established by the reversal in *Bateman* v. *Murray*. They did not perceive that the previous part of the statute made it *declaratory* of the old law, as well as enactory of the new.

The planners of the proviso failed in their object.

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said, that there was scarcely any great public measure adopted in Ireland, whilst Lord Pery engaged in business, which had not its seminal principle in his comprehensive mind. The Corn Laws, the Free Trade, the Independence of the Irish Parliament, the *Tenantry Bill*, were framed with his assistance, and would not have been carried without it. The tillage of Ireland may be regarded as his child.—1 *Hardy's Life of Charlemont*, 159.

The proviso applies only to the enacting part.

Therefore, although their proviso took these cases out of the operation of the enacting part of the statute, it could not take them out of the declaratory part, which set up the old Irish equity; and declared that that equity had been the law of Ireland before the statute, *and up to the time of its enactment.* Therefore the statute excluded the English equity altogether, even before its enactment; because it declared that all the equity before the statute had been the old equity of Ireland: therefore the planners of the proviso failed to get their cases within an English equity; because the statute operated *ex post facto* to extinguish it: for a declaratory act operates *ex post facto:* and they failed to exclude these cases from the Irish equity, which was their real object.

Difference of opinion between Lord Lifford and Lord Pery, in Magrath *v.* Muskerry.

These considerations form the ground work, as they do the strength, of Lord Pery's argument against the opinion of the Lord Chancellor in this case. Lord Pery's view simplifies the equity of Ireland into this plain and obvious distinction, namely the equity created by the statute, and the equity declared by the statute; the latter being the old equity of Ireland, and the former that same old equity with the simple addition that the indulgence could be terminated by notice from the landlord and neglect of the tenant to comply with such notice within a reasonable time. But Lord Lifford, by his argument, would create three equities; *first*, the Irish equity, before the reversal in *Bateman* v. *Murray; secondly*, the English equity, from that period to the 15th May, 1780; and *thirdly*, the equity under the statute. This seems to the Editor to be one source of the inconsistencies which occur in the judgments given by Lord Lifford in these two cases.

A further difference between these learned Lords is that already noticed, respecting the proposition, whether the tenant's right is gone, by all the lives being dropped. Lord Pery states the case of *Munsell* v. Lord *Blessington*, greatly litigated before Chief Baron Bowes; in which a renewal was decreed, although the bill was not filed until five years after the time when all the lives were gone; and that decree on appeal was affirmed by the Lords of England. He adds, that a number of cases to the same effect were determined in Ireland and ratified in England. And as to the case cited by the Lord Chancellor of *Ryan* v. Lord *Clonmore*, in the court of Exchequer, he denies that the decree had been made on the ground that all the lives were gone.

These authorities, together with *O'Neil* v. *Jones*, decreed by Lord Lifford himself, wherein all the lives were gone, together with his Lordship's own opinions, expressed in the case of *Boyle* v. *Lysaght*, are authorities against the opinion expressed by him on this matter in the case of *Magrath* v. *Muskerry*.

Equity is bound down by precedent.

Lord Pery further differs with Lord Lifford in the importance which the latter attaches to the reversal by Lord Thurlow, in *Bateman* v. *Murray*; maintaining that that was but a single decision, and by no means sufficient to overturn the long line of authorities in both countries, which had decided the other way. Our system of equity is a laboured, connected system, governed by established rules, and bound down by precedents; and is not, as it has been unfairly represented, the mere decision of a single judge; or as it has been stated by Mr. Selden, with more pleasantry than truth—"For *law*, we have a measure, and know what to trust to; equity is according to the conscience of him that is Chancellor; and as that is larger and narrower, so is equity. 'Tis all one as if they should make the standard for the measure of a Chancellor's foot. What an uncertain measure would this be! one Chancellor has a long foot, another a short foot; a third an indifferent foot. It is the same thing with the Chancellor's conscience."

Selden's mistaken idea thereof.

It would be in some respects adopting Selden's idea of equity, if the single authority of Lord Thurlow, or that single case, namely the reversal in *Bateman* v. *Murray*, could overturn a long line of previous decisions in both countries, which determined a contrary way.

The next appeal case is:

April 8th, 1788.

Edward Deane Freeman, Esq. Executor of Jane Freeman, widow, deceased, who was Devisee and Executrix of William Freeman, Esq. deceased,
Appellant.
John Boyle, Esq.
Respondent.

JOHN Lord Kingston being seised in fee of the lands hereinafter mentioned, by indenture, fourteenth May, 1669, demised to John Freeman, deceased by the following description: "In the North West end of Killvallyvorieby, including Knockardgeahy, Knocknanimy, Kildinane, Knaghall, Tulladuffe,

In this case the Lords reversed the decree of Chancery, dismissing the tenant's bill, and declared him entitled to a renewal upon the usual terms of paying septennial fines with interest.

and Lisnogreany, part retrenched by George Mihill, 223 acres more in the same, besides the said retrenchment, and 694 acres confirmed to Richard Lord Bishop of Ferns and Leighlin, by purchase, and 306 acres confirmed to George Mihill, 173 acres, be they more or less, plantation measure, being in the barony of Derhallow and county of Cork," to hold the aforesaid number of acres, with their and every of their appurtenances, unto the said John Freeman, his executors, administrators and assigns, for the term of 99 years, from the first day of May, then preceding. Provided John Freeman, Edward Freeman, and William Freeman, the children of said John Freeman, the lessee, should so long live, at the yearly rent of £22, subject to certain duties, covenants, conditions and agreements, with covenants for perpetual renewal.

The reversion and inheritance of said lands became vested in Bellingham Boyle, Esq., the great uncle of the respondent, and the term and interest of John Freeman, the lessee, became vested in his son Edward, upon whose death administration was granted to his widow Elinor; John Freeman, one other of the lives named in the lease, having also died; Bellingham Boyle by indenture, 25th February, 1717, demised the lands to Elinor for 99 years, provided William Freeman, senior, of Kilbarry, William Freeman, junior, his son, and Jane Freeman, daughter of Elinor, or any of them, should so long live, at the same yearly rents, and subject to the provisoes, covenants, and clauses in the original lease contained.

Elinor Freeman died, and by her will devised her interest in the lease to Jane her daughter, who afterwards married Robert Barry, and by lease and release, 11th and 12th August, 1718, mortgaged the lands to John Freeman of Ballinguile. Jane died 25th July, 1726; and John Freeman the mortgagee, on 20th June, 1727, preferred a petition in the court of Exchequer, stating that Bellingham Boyle, the elder, was dead, and that the reversion and inheritance vested in Bellingham Boyle, his nephew, a minor, that Mary Daliel was his guardian, and praying that she might execute a renewal, by inserting the name of Richard Freeman, eldest son of John, the mortgagee, The guardian put in answer, and it was ordered by the court, that she should, on payment of a year's rent as a fine, and all arrears of rent and duties, for the use of the minor, perfect a new lease to the said John Freeman, and insert the life of Richard Freeman, pursuant to an act of Parliament

for enabling guardians and others to renew leases of lives: accordingly, by indenture 8th July, 1727, the guardian executed a renewal for the like term, with the like rents, clauses, and covenants of renewal contained in the original lease, provided W. Freeman, senior, W. Freeman, junior, and Richard Freeman, or any or either of them, should so long happen to live. W. Freeman, senior, purchased Barry's equity of redemption, and obtained a reconveyance of the mortgage: he died in 1732, having devised his estate in the premises to his son W. Freeman of Castlecorr: Richard Freeman, one other of the *cestui que vies*, died on the 30th December, 1736: and on the 7th January, 1739, W. Freeman of Castlecorr, nominated to Bellingham Boyle, who was then of full age, the lives of John Bastable and W. Freeman, fourth son of John, as two lives to be inserted in a renewal, which was accordingly executed at the like rent, fines, and covenants for renewal, as in the original lease. In this renewal of 1739, the original lease of 1669, the renewals of 1717 and 1727, the payment of the renewal fines, and nomination of the lives, are all recited; it is also recited, that the covenant for renewal was a covenant for renewal *for ever*, and it is set forth *verbatim*, it is the same as the covenant in *Boyle* v. *Lysaght*. W. Freeman, the fourth son of John, died in 1759, and W. Freeman the lessee in the renewal of 1739, died in 1764, having made his will, and appointed Jane, his wife, his sole executrix and devisee. Bellingham Boyle died in 1770, leaving the respondent his eldest son and heir at law, who became entitled to the inheritance of said lands, and having declined to execute a renewal, a bill was filed against him in Chancery on the 12th November, 1774, by Jane Freeman, praying that the respondent might be decreed to come to an account, and receive what should appear due to him for renewal fines and interest and arrears of rent, and that thereupon he might be obliged to execute a new lease, agreeable to the terms of the original one. In aid of the relief sought by the bill, it was stated that shortly after the death of the *cestui que vie* in 1759, W. Freeman, the lessee, applied to B. Boyle to execute a renewal, and made such surrender, and tendered an engrossed draft of a new lease, and such fine as required by the covenants in the original lease; that thereupon B. Boyle agreed to execute a renewal, but being a man inattentive to business, or for some other reason, he put off the execution of such renewal, and Mr. Boyle residing chiefly in Dublin, and

II. Anne, c. 2.

Freeman in the county of Cork, at a distance of 120 miles, the latter was disabled from pressing for a renewal, and was the more negligent in enforcing it, as he lived on terms of intimacy and friendship with Mr. Boyle, whom he knew to be a man of honour and integrity. That Jane, the executrix, applied to Mr. Boyle, who promised to execute a renewal upon his arrival in Cork, but that he died without executing such renewal. That the respondent was applied to, and he promised to exeeute a renewal, and in particular that Jane Freeman wrote a letter to the respondent in November, 1773, in which she informed him, that she desired to have a renewal executed, and to pay him all fines and rents then due; which letter the respondent answered, by a letter to Matthew Freeman, son of Jane, wherein he said, "I beg you will be so good as to make the best apology to Mrs. Freeman that you can, and assure her that I should have answered her letter long since, but waited till my attorney came from Dublin; I hope very soon to be able to perfect them for her." That notwithstanding this letter, the execution of the renewal being postponed, on the 6th March, 1774, a sum of money was tendered to the respondent, much more than was due to him for fines, interest, and rent, in order that he might take whatever sum he claimed to be entitled to, which the respondent refused, though he had, since his age of twenty-one years, received the rents payable out of the premises.

The respondent on the 9th February, 1776, put in his answer, and a further answer on the 30th June, 1777, admitting the original lease and renewals: did not believe that W. Freeman of Castlecorr applied to respondent's father to execute a renewal, or offered to pay the renewal fine, or make such surrender, or tender such engrossed, or any draft of a new lease, or that his father agreed thereto; on the contrary, believed no such application was ever made. Denied that he (the respondent) was applied to by Jane Freeman, or any person, to execute a renewal till some time in the year 1774, about three years after he came of age, when a sum of money was tendered to him, which he refused, being advised, that by the breach of the eondition in not surrendering the old lease, and tendering a new one, and also paying the renewal fine within one year after the death of the *cestui que vies* respectively, the lease was absolutely at an end, and all right of renewal entirely barred and forfeited. Admitted the letter written to M. Freeman, but said it was written when he was ignorant

of the covenants contained in the lease, and of the lives; that if he had any knowledge or belief of the wilful neglect to renew the lease pursuant to the covenant, he would not have expressed any intention to renew the same either by letter or otherwise.

Jane Freeman replied to these answers, and the respondent rejoined, and issue being so joined, the parties entered into a consent, which was made a rule of court, 14th December, 1779, that the following matters and facts should be admitted on the hearing as if proved, that the plaintiff, Jane Freeman, was sole executrix and devisee of William Freeman; that application and tender of fine and interest was made by the plaintiff to the defendant, 6th March, 1774, that W. Freeman died on the 21st of May, 1764, and that B. Boyle died on the 13th May, 1771, that the deed of the 7th January, 1739, should be read as proved; that W. Freeman, one of the *cestui que vies*, died 6th June, 1759, and W. Freeman the lessee, another, died 21st May, 1764.

The cause was heard on the 8th, 9th, and 10th days of June, 1780, when the Chancellor (Lord Lifford) was pleased to dismiss the bill with costs. After pronouncing this decree of dismissal, to wit, in 1783 Jane Freeman died, having bequeathed to the appellant, who was her grandson, all her real and personal estates and effects whatsoever, and appointed him sole executor.

He brought this appeal to reverse the decree of dismissal, and to have a renewal as sought by the bill.

Leases for years depending upon lives, are substantially the same as leases for lives.

First. Because tenants holding under leases for years determinable upon lives, with covenants for perpetual renewals, are entitled to the same relief in a court of Equity as tenants holding under leases for lives renewable for ever. A lease of 99 years, provided any one of three lives lasts so long, being substantially the same as a lease for three lives, except in the nature of the estate; but courts of Equity, in cases of this kind, found their decrees not on the nature of the legal estate, but on the covenant of perpetual renewal, which ought to have the same operation in both cases.

Secondly. Because, where a tenant holding under a lease for *lives* renewable for ever, is guilty of delay, he has no greater right to the aid of a court of Equity, than if he held under a lease for *years* renewable for ever; and if the breach of the strict terms of the covenant has been uniformly dispensed with in the former case, it would be

unjust to enforce them in the latter, the inconvenience which might arise would be great, as families would be deprived of their settlements, and creditors of their security, equally in both cases; it is a sound maxim of equity, that where there would be the same mischief there should be the like remedy.

Renewals decreed where all the lives are gone.

Thirdly. Because that courts of Equity do not found their decrees of renewal upon the property of a freehold estate, appears from this, that renewals have been decreed where all the lives have been gone for many years, and no legal estate whatsoever existed in the tenant, upon which the decree could operate. It would be strange to suppose that a court of Equity decreed on the ground or properties of a legal estate, which had no existence; these decrees have been founded, not on technical distinctions, or legal subtleties, but on maxims of general justice and sound policy: on the real intent of the parties to give a perpetuity to the tenant, and on the ample compensation which has been made to the landlord, by septennial fines, with interest; reasons which all apply with equal force to leases for *years*, renewable on the fall of lives, as to leases for *lives*.

Strict performance of the covenant not insisted upon.

Fourthly. Because the tenant in the present case has complied with the substantial parts of the covenant: the rent, fines, and interest were tendered to the respondent, and the lives were nominated. The respondent and his ancestors never insisted on the strict performance of the terms of the covenant; the formal surrender of the old lease by a regular deed, and the execution of the new one were not required by the landlord, but were uniformly dispensed with by the parties, who rested satisfied with the payment of the fine, and nominating the lives, and have by their repeated acts for a great number of years put their construction on their own covenant, and the respondent did by his letter waive all former laches, if any there were, and did promise to renew. And

If a landlord dispenses with the performance of a condition, he cannot insist upon a forfeiture for the non-performance.

Fifthly. It is conceived, that if a landlord, before a breach of condition, dispenses with the performance of it, or after a breach of condition waives the forfeiture, a court of Equity will not suffer such landlord afterwards to insist upon the forfeiture, upon account of the non-performance of that condition, with which he so agreed to dispense.

For the respondent it was argued that the decree ought to be affirmed.

First. Because the interest conveyed by the original

lease and subsequent renewals, is manifestly a term for years, determinable upon the fall of lives, and expressly conditioned to be void upon the non-performance of certain acts by the tenant within a limited and certain time, and being merely a term for years, did become actually void without entry, or any act to be done on the part of the lessor, upon failure in the tenant to perform the conditions imposed upon him, upon the fall of any of the lives.

A term for years conditioned to be void upon non-performance of certain acts, becomes void without entry.

Secondly. Because W. Freeman, the lessee, the person claiming an interest in the term for years, demised by the renewal lease of January, 1749, did not perform the conditions stipulated by the said lease, within twelve months after the death of W. Freeman, the son of John Freeman, in 1759, nor at any time during his, the lessee's life, or the life of B. Boyle, the respondent's father, who was then entitled to the inheritance; and Jane Freeman, who on the death of William, the lessee, became entitled to the interest in the term for years, did not within twelve months after the death of William, the lessee, nor at any time during the life of B. Boyle, perform the said condition, in consequence of which failure, the term for years became absolutely void, and incapable of being renewed or revived.

Thirdly. Because the principle upon which courts of Equity have heretofore decreed renewals, namely, the avowed and express intention of the parties, that the tenant should upon certain terms have a perpetual interest, does not apply to this case; for by the terms of this lease, and the express agreement of the parties to it, the lessor, his heirs and assigns, even though the tenant should have performed the condition within the limited time, had an option to refuse accepting the surrender and fines, and in such case it is provided, that the tenant should hold for the residue of the term of 99 years then unexpired; and to decree a renewal in this case would be to take away that option of the lessor, contrary to the terms of the agreement, and to put a different construction upon the covenant from that plainly expressed by the parties themselves.

Fourthly. Because supposing, but not admitting, that the tenant in this case had any original equity, that equity has been forfeited by gross laches, for it does not appear that during a period of fifteen years, from 1759, the time of the fall of the first life, to 1775, any attempt was made towards performing the condition, nor is this laches in any manner whatsoever accounted for, and in all instances hitherto such gross laches has been considered by courts of

Equity, as conclusive evidence of fraud, or dereliction, either of which is sufficient to destroy the equity of a tenant claiming under a covenant for renewal. This principle was recently taken up very strongly by this House, in a case (*Magrath* v. *Muskerry*) determined subsequent to the act passed in this kingdom for the relief of tenants holding by leases with covenants for perpetual renewal.

Fifthly. Because though it is alleged that renewals were demanded by W. Freeman from the late B. Boyle, father to the respondent, and also by Jane Freeman, and by him promised to be executed, yet nothing of that sort is even attempted to be proved, though nothing could more easily admit of proof, if such had existence.

Sixthly, Because the letter mentioned in the pleadings to have been written by the respondent is not sufficient to entitle the appellant to the renewal which he seeks; this letter will prove nothing, unless coupled with the explanation given of it by the respondent in his answer; and it appears evidently from the style in which it is written, that business was at that time an object very little in the contemplation of the respondent.

Decree reversed.

It was *ordered* and *adjudged*, that the decree of dismissal complained of in the appeal be reversed; and it was declared that the appellant was entitled to a renewal according to the covenant in the lease of 7th Jan. 1739, upon payment of all arrears of rent and of fines with interest, according to the usual course of the court of Chancery in such cases. And it was ordered, adjudged, and decreed, that the respondent do execute, pursuant to the said covenant, a new lease to the appellant for the term of 99 years, provided the said appellant, E. D. Freeman, and the Rt. Hon. Robert Tilson, Lord Muskerry, the lives nominated in the bill, in the place of the two lives which had then fallen, and such third person as the appellant should nominate in the place of J. Bastable, who the parties admit died about two months ago, or any or either of them, shall so long live, under the like rents and fines, conditions, reservations, covenants and clauses as in the said lease of the 7th January, 1739, on the appellant's paying a fine of £22, with interest from the 6th June, 1760, another fine of £22, with interest for the same from the 6th June, 1768, another fine of £22, with interest for the same, from the 21st May, 1765, another fine of £22, with interest for the same, from the 21st May, 1770; and another fine of £22, as and for a fine on the nomination of a life in the room of

J. Bastable; and also on the appellant's paying to the respondent all rent and arrears of rent due to the respondent under said lease: such of the said fines as became payable to B. Boyle, Esq. respondent's father, in his life time, with the interest for the same to be paid to the personal representative of the said B. Boyle, and the remaining fines with interest for the same to be paid to the respondent. And it was further ordered, that it be referred to a master to take an account of the fines and interest and of the rents, and of what the respondent made, or without wilful default might have made of the lands and premises comprised in the lease from the time he got in possession of the same:* and if it should appear that respondent received, or might have received sufficient to satisfy and discharge all such fines, together with interest for the same, and also all arrears of rent due to him, then the interest upon such fines to cease and not to be computed upon such fines from that time. And it was further ordered, that respondent should have his costs in Chancery, making allowance for the costs paid him upon the dismissal. And if it should appear that any balance remained in the hands of the respondent, the appellant was declared entitled to the same. And when the master should have made his report, the court of Chancery to give all necessary directions for carrying this judgment and decree into execution.—2 *Ridg.* P. C. 69.

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* To explain this part of the decree, it may be necessary to mention, though it does not appear in the printed cases, that Mr. Boyle had brought an ejectment for the recovery of the lands, upon the supposition that the lease was forfeited by the neglect to surrender it, and demand a renewal within the time limited by the covenant. A verdict was found for the plaintiff, subject to the opinion of the court, upon a point reserved, "Whether Mrs. Freeman (the defendant) had a legal subsisting interest in the lands during the life of John Bastable, the surviving life in the renewal of 1739, then and still living." The defendant neglecting to have this point argued, Mr. Boyle obtained judgment, and on 16th May, 1781, took possession under an *Habere.* An ejectment was afterwards brought by E. D. Freeman against Mr. Boyle, in which the former recovered.—2 *Ridg.* P. C. 84, *n. vide Vern.* and *Scriv.* 402.

Observations on the Case of Freeman v. *Boyle.*

Observations on Freeman *v.* Boyle.
The term was gone, yet a renewal decreed by the Lords.

THIS cause was heard in Chancery in June, 1780, that is, after the reversal in *Bateman* v. *Murray*, and before the enactment of the Tenantry Act: Lord Lifford dismissed the bill of the tenant, and his decree was reversed by the Irish House of Lords in eight years afterwards; shortly subsequent to the decree in the appeal cause of *Magrath* v. *Muskerry*. The opposition to his Lordship's legal view of that case, which under the guidance of Lord Pery had so nearly overruled the Chancellor in the House of Lords, in *Magrath* v. *Muskerry*, seems to have been entirely successful in this case, which came on before the same House in the year following, and added another authority to the many already pre-existing of the tenant's right to renewal, even where the term was gone. The Editor is the more anxious to mark the bearings of the cases on the proposition, whether the extinction of the term or the freehold extinguishes also the tenant's right to renewal; because an opinion to that effect has lately been given from very high authority, namely, by Lord Eldon, when giving judgment in the case of *Fitzsimon* v. *Burton*, which the Editor apprehends is not consonant to the tenor and spirit of the equity decisions respecting this equity peculiar to this country. There can be no doubt that it is peculiar.

Three characteristics of the peculiar equity ot Ireland as to these tenures.

First. Because the old equity which makes a part and a chief part of the present Irish equity, is manifestly peculiar to Ireland; so maintained by the high equity tribunals of Ireland: so admitted by the highest equity tribunals of England; as well as by Sir Pepper Arden, *vide ante, p.* 58; and admitted by these tribunals of England to be the law of Ireland.

Secondly. Because the compensation for the lives dropped as well as those that might have been dropped, without which compensation there could be no equity decreed, has been received and admitted by the high equity tribunals respecting Ireland, as an adequate compensation established on the principle of those septennial fines introduced by Chief Baron Gilbert into the courts of Ireland; which principle so introduced is peculiar to the law of Ireland; entirely unknown to the law of England; and is another chief characteristic of the peculiarity of this Irish equity

in the administration of which this compensation by these septennial fines forms a main and essential ingredient.

Thirdly. Because the Tenantry Act constitutes a code of equity law totally unknown to the laws of England.

About a year after the renewal of this decree, on the 28th April, 1789, Lord Chancellor* Lifford died, after having held the great seal of Ireland for more than twenty-one years, and was succeeded by the then Attorney-General, John Fitzgibbon, created afterwards Earl of Clare.

There is but one reported case on this subject during the Chancellorship of Lord Clare, it is that of

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* The following list of Irish Lord Chancellors is cotemporaneous with the legal period from the time when the great seal of England was held by the great Lord Bacon, and of course includes the period within which the system of our equity jurisprudence was organized and matured into its present form and substance.

Lord Chancellors of Ireland.

1619 Adam Loftus, afterwards Viscount Ely.
1639 Sir Richard Bolton.
1656 William Steele, Esq.
1680 Sir Maurice Eustace.
1665 Michael Boyle, A. of Dublin.
1686 Sir Charles Porter.
1687 Sir Alexander Fitton.
1690 Sir Charles Porter.
1697 John Methuen, Esq.
1703 Sir Richard Cox, Knt.
1707 Richard Freeman, Esq,
1711 Sir Constantine Phipps, Knt.
1714 Alan Broderick, afterwards Viscount Middleton.
1725 Richard West, Esq.
1727 Thomas Wyndham, afterwards Lord Wyndham.
1739 Robert Jocelyn, afterwards Lord Newport.
1757 John Bowes, afterwards Lord Bowes.
1767 James Hewet, afterwards Lord Lifford.
1789 John Fitzgibbon, Earl of Clare.
1802 John Lord Redesdale.
1806 Rt. Hon. George Ponsonby.
1807 Thomas Lord Manners.
1827 Rt. Hon. Sir Anthony Hart.

Joseph Deane and Edward Deane Freeman v. *The Marquess of Waterford.*

July 7, 1795. *Chancery*—Before Lord Clare.

Reasonable time within the act is no more than what is necessary to give the tenant full opportunity for ascertaining when the *cestui que vies* died, for computing the amount of the fine due, and for preparing leases and tendering them for execution.

Sed vide post Lord Redesdale Jackson *v.* Saunders.

In 1709 the ancestor of the defendant demised to Edward Deane, (under whom the plaintiffs claimed,) for the lives of Edward Deane, George Robins, and Joseph Robins, with a covenant for perpetual renewal. Edward Deane, the *cestui que vie*, died in 1748: of the other lives, one dropt in 1754, and the other in 1761. From thence the tenant continued to occupy, no step appearing to have been taken on either side until February, 1793, when Mr. Glascock, the solicitor for the defendant, informed Mr. Furlong, the solicitor for the plaintiff, that a sum was due for renewal and septennial fines and interest on account of said lease, amounting to £150 13s. and furnished him with a copy of the lease, and also with a computation of the fines and interests. According to this computation, Mr. Glascock calculated fines at the different legal rates of interest from the year 1717, in which year a person named Edward Dean had died, whom as he conceived, and as defendant insisted was the *cestui que vie* in the lease; but the plaintiffs proved this to be a mistake, and that the Edward Deane named in the lease had lived till 1748. This bill was filed on the 17th of March, 1794, praying a renewal, on payment of all such rent and arrear of rent, fines, and septennial fines and interest, as should appear to be due since the lives actually dropt.

Lord Chancellor. (After some preliminary observations on the statute 19th and 20th Geo. 3, the cause of its being enacted, and the law on the subject as it had previously stood.)

In construing the particular clause in this act, upon which the present question depends, I shall recur to the old principle of equity which so long prevailed in decreeing a renewal to the tenant. The act declares, that unless the tenant shall pay his renewal fines within a reasonable time after a demand made, he shall forfeit his right of renewal; and the single point in this case is, whether under all the circumstances which are in proof, the plaintiff has incurred such a forfeiture. It certainly appears that he has been guilty of gross neglect, unaccounted for, in not renewing his lease: the first life fell in the year 1748, the

second in 1754, and the third in 1761 : no application whatever was made on his part for a renewal. But in Feb. 1793, an application appears to have been made to him on the part of the defendant: Mr. J. Glascock, the agent for the defendant, then informed him that all the lives in his lease had fallen, and called upon him to renew; and to enable him so to do, furnished him with a copy of his lease, it being alleged that he had lost his part of it. It appears that Mr. Glascock also referred him to a Mr. Barnes for information as to the time when Joseph and George Robins, two of the lives named in the lease, had died : and if Mr. Glascock had stopped here, I should have very little doubt in dismissing this bill. But it appears that Mr. Glascock, certainly with the best intentions, proceeded to make a calculation of the sum due to the defendant for renewal fines, which he compnted to amount to £550, and with with which he furnished Mr. Furlong, the plaintiff's agent. This computation appears now confessedly to have been founded in error: it was made upon a supposition that E. Deane the elder, who died in 1717, was one of the lives in the lease; whereas it now is acknowledged that Edward Deane the younger was the life, and that he did not die until 1748, and from this error, into which the plaintiff fell at the time, and which originated with the defendant, has the delay of the plaintiff in renewing his lease since the year 1793 manifestly arisen. It is in proof in the cause that the plaintiff's present profit rent is but £26 a year, but that it may rise to £62 : it is clear therefore that, when, according to Mr. Glascock's calculation, the fines amounted to £550, it became a matter well worthy the consideration of the tenant whether he would renew or not. It was objected upon his part, by Mr. Furlong, that the interest was calculated by Mr. Glascock at eight and seven per cent. upon some of the fines payable on the supposed death of Edward Deane the elder, money having borne that rate of interest in this kingdom until the year 1732, whereas these fines ought to bear interest at six per cent. only: the objection seems not to have been well founded; as legal interest at the time when the debt accrued, must have been the rule of calculation; and therefore if Mr. Glascock had been right in his supposition that E. Deane the elder was the life named in the plaintiff's lease, in my opinion his calculation was just. However the objection was made, and manifestly proceeded from a mistake in point of fact by both parties, a mistake originating

Legal interest when the debt accrued by the non-payment of the fines should be calculated by the rate of interest legal at those times.

with Mr. Glascock, who said he would lay the case before the defendant's counsel, and communicate his opinion upon it to Mr. Furlong. It does not appear however that this was done, and the matter rested in negociation between Mr. Glascock and Mr. Furlong, from February, 1793, to the 10th August, 1793, during the whole of which period both parties supposed that E. Deane the elder was one of the lives named in the plaintiff's lease, and that the renewal fines were to be charged upon the fall of that life in 1717: and whilst the plaintiff continued in this error, it was certainly well worth his consideration whether to redeem his lease at an expense of £550. But it now appears that both parties were mistaken in this essential fact: the tenant was deceived as well as the landlord; and it appears evidently that this deception continued for several months subsequent to August 1793; and if the deception had not taken place, it is material to observe that the question which was made by Furlong upon the rate of interest charged on some of the fines could not have arisen, as interest had been reduced to six per cent. long prior to the year 1747, when E. Deane the younger died: and that in consequence of this deception, the amount of fines as computed by Glascock, was nearly one half greater than the sum really due by the plaintiff. Therefore, as the delay in settling this business originated in mistake and error, a mistake and error proceeding in the first instance from the landlord, this is a clear ground for the interposition of a court of Equity to relieve the plaintiff from any forfeiture which he might otherwise incur. Certainly, however, the the plaintiff has, in this case, acted with so little vigilance or attention on his part, in clearing up this mistake, and ascertaining the fines really due to his landlord, subsequent to the 10th August, 1793, when a formal demand was made upon him, that he cannot be entitled to a decree in this cause, unless upon the fullest indemnification to the defendant from all the consequences of his negligence and inattention. If this mistake had not happened, I should not hesitate to say that the tenant, under all the circumstances of this case, ought not to have a specific execution of the covenant for renewal: and if I were on the abstract question to declare what ought to be decreed a reasonable time within this clause of the act, I would say that it was no more than what was necessary to give the tenant full opportunity for ascertaining when the *cestui que vies* died, for computing the amount of the fines due, and for preparing leases and tendering them for execution. The

precise time allowed the tenant cannot necessarily be defined; it must depend upon the difficulties which he may fairly have to encounter in complying with the demand: but I should incline strongly to determine that if a precise time for payment of the renewal fine was limited by the lease upon the fall of each life, that the tenant ought to be restricted to the same time after a demand made, unless he has a fair and reasonable excuse to assign for exceeding it. So if no time was limited by the lease, I should incline strongly to adopt the rule by analogy to the statutes giving the remedy by ejectment for non-payment of rent; and to determine that the tenant coming into a court of Equity for a renewal, after six months from a demand made upon him, ought to be able to account fairly for his neglect. In this case I think the error into which the tenant fell with respect to the identity of one of the lives comprised in his lease, is a sufficient ground for the interposition of a court of Equity, to relieve him from the forfeiture which otherwise, in my opinion, he must have incurred; and upon this circumstance alone it is that I ground my decree for a renewal. But he can have a renewal only upon the terms of paying to the defendant all the costs to which he has been put at law and in equity, and of course paying all arrears of rent and fines, and septennial fines, with interest.

Therefore, decree the plaintiff entitled to specific execution of the covenant for renewal comprised in his lease, on payment of all arrears of rent and fines, and septennial fines, with interest, and of the full costs of the ejectment brought by the defendant, and the full costs of this cause. Refer it to the Master, &c. &c.—1 *Scho. and Lef.* 361. *n.*

Observations on the Case of Freeman v. *Marquess of Waterford.*

Observations on the case of Freeman *v.* M. of Waterford.

What shall be reasonable time under the Tenantry Act.

Judgment of Lord Clare.

The Tenantry Act declares, that unless the tenant shall pay his renewal fines within a reasonable time after a demand made, he shall forfeit his right of renewal: it therefore becomes important to ascertain what shall be deemed a reasonable time under the statute. On that subject Lord Chancellor Clare, in the case of *Freeman* v. *Marquess of Waterford*, has given the following opinion in his judgment on that case: "If I were on the abstract question to declare what ought to be deemed a reasonable time within this clause of the act, I would say that it was no more than what was necessary to give the tenant full

opportunity for ascertaining when the *cestui que vies* died, for computing the amount of the fines due, and for preparing leases and tendering them for execution. The precise time to be allowed the tenant cannot necessarily be defined; it must depend upon the difficulties which he may fairly have to encounter in complying with the demand: but I should incline strongly to determine that if a precise time for payment of the renewal fine was limited by the lease upon the fall of each life, that the tenant ought to be restricted to the same time after a demand made, unless he has a fair and reasonable excuse to assign for exceeding it. So if no time was limited by the lease, I should incline strongly to adopt the rule by analogy to the statutes giving the remedy by ejectment for non-payment of rent; and to determine that the tenant coming into a court of Equity for a renewal, after six months from a demand made upon him, ought to be able to account fairly for his neglect."—*Jackson* v. *Saunders*, 1 *Scho. and Lef.* 454.

Due diligence is payment as soon as circumstances will reasonably permit.

Lord Redesdale in 1802, seven years after the case last referred to, rejects the strictness of the rule there suggested; he says, "the effect of the demand is to inform the tenant that the life is dropt, if he does not know it before; and to apprise him that it is expected he will use due diligence in paying the fine and accepting a new lease. Then what is *due* diligence? it is, payment as soon as circumstances will reasonably permit. For instance, if a demand be made on a tenant when resident in a foreign country, or at a distance from his own home, the time within which it would be possible for him to comply would be very different from what it would be if he were on the spot; a variety of qualifying circumstances may make that due diligence in one case, which is not so in another."—*Scho. and Lef.* 462.

Reasonable time, from the circumstances of the case.

"The act has specified no time, and I am called upon to give a fixed rule (six months were insisted on) where the legislature has thought fit to give no fixed rule: it is safer to hold that reasonable time is always to be judged of by the circumstances of the case."—*ib.*

Tenants should renew as the lives drop, and be compelled to renew.

"The best thing for tenants having estates of this kind, is to renew as the lives drop, unless they intend to defraud their landlords: and where these interests are in settlement, I think it particularly important to compel renewal from time to time; for the tenant for life never will renew as long as he can avoid it; because if the compulsion does not happen in his time, he puts all the rents and profits in his own pocket."—*ib.*

In the case of *Freeman* v. *The Marquess of Waterford*, Mr. Glascock, the agent for the landlord, calculated the interest on the fines, not at six per cent. upon the entire, but at six per cent. during that period wherein the legal interest in Ireland was restricted to that sum; and at seven per cent. during that period when interest to that amount was by law allowable in Ireland; and at eight per cent. during that more remote period, when the legal interest of Ireland was so high. This mode of calculation was objected to; but Lord Clare recognised this mode of calculation as a just one, on the principle, that the legal interest at the time when the debt accrued must have been the rule of calculation.

Interest in Ireland, at what amount and at what periods varied,

It therefore becomes necessary to ascertain the times at which the great variations in the amount of legal interest on the loan of money in Ireland, were enacted: so far at least as may be necessary to cover any calculations on these leases. By the 10 Car. 1. s. 2. c. 22. Ir. which was enacted in the year 1634, the legal interest on the loan of money was restrained in Ireland to ten per cent. and so continued from that period until the year 1703, when by the 2 Anne, c. 16. Ir. the rate of interest was reduced in this country from ten to eight per cent., and so continued at eight per cent. from 1703, to 1721, when by the eighth *Geo.* 1. c. 13, *Ir.* it was reduced to seven per cent. and so continued from 1721, until 1731, when by the 5* Geo. 2. c. 7. Ir. it was reduced to six per cent.

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* The principles on which these reductions of interest were made are collected and summed up in the following preamble to the last statute on this subject:

An Act for reducing the Interest of Money to Six per Cent.

(5 Geo. 2. c. 7. Ir.)

"Whereas the reducing of interest to eight, and from thence to seven, in the hundred, hath by experience been found very beneficial to the advancement of trade and improvement of lands: and whereas at this time there is a very great abatement in the value of divers merchandizes, wares, and commodities of this kingdom, both at home and also in foreign parts, whither they are transported, which is in great measure occasioned by foreign merchants being enabled to procure money at less expense and for less interest, than the merchants in this kingdom; by which

The reasons assigned by statute, for the reduction of interest on the loan of money in Ireland.

A verbal demand, and by an agent, sufficient.

This is the first reported case which lies *entirely* under the Tenantry Act, and is decided on what may be called the statutable equity in Ireland, which, as well as the old equity of Ireland, are both peculiar to this country, and each different from the equity of England. The demand by Mr. Glascock for the landlord on the tenant seems to have been a *verbal* one, and of course seems to have been considered sufficient, long before it was more specifically decided in *Barrett* v. *Buck*, 5 *Dow*. P. C. 1. The case turned on the question of how far the tenant had been excusable or inexcusable in not complying with the demand within reasonable time. This case also shews that a demand by an agent had been considered as sufficient under the statute long before that point had been so decided in *Lord Mount Norris* v. *White*, 2 *Dow*. P. C. 459.

In this case also all the lives had dropped.

It is further observable, that in this case all the lives had been dropped, and no application for a renewal by the tenant for thirty-two years after the fall of the last life.

The next case is that of

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means they can give greater prices for their native commodities and manufactures, and sell them cheaper abroad, by having a greater gain in proportion to their risk, from their freight cheaper by the lowness of interest: and whereas the value of lands would rise at home, and the owners and occupiers of lands would be enabled to improve them by fencing, draining, manuring, and otherwise cultivating them, and manufactures, and other useful arts, and fisheries might be improved, upon procuring money at an easy interest; and also usurers, and others, who now live upon the interest of their money, would betake themselves to some useful art, calling, or trade, or become industrious improvers of the lands of this kingdom, which they cannot now do to any profit, whilst the interest on loan continues at so high a rate as seven pounds in the hundred pounds for a year; which mischiefs cannot be prevented, nor improvements made, without reducing interest to a nearer proportion with the interest allowed for money in foreign states."

The high interest on the loan of money in Ireland, was reckoned amongst the impediments to her prosperity so long since as the year 1682.

"The fourth impediment is the height of the interest of money; for Holland, that hath money at three per cent. and England at six, eat up traders in Ireland, where money is difficult to be procured at ten; whereby the one will undersell the other at his own doors, and run them down in manufactures."—*Lawrence, Interest of Ireland, p.* 7.

Lennon v. *Napper.*

Dec. 20, 1802.

A judicial view by Lord Redesdale of the Tenantry Act, and the reported cases as to Irish renewals which precede that statute.

In this case, (which is not reported at large, as having been decided upon its own very peculiar circumstances,) the following general observations upon the subject of Renewals, and upon the cases decided before the Tenantry Act, 19 and 20 Geo. 3. c. 30, were made by the *Lord Chancellor* in giving judgment.

(After stating that this suit, having been commenced before the passing of the Tenantry Act, came within the saving therein, his Lordship proceeded)—The act is declaratory as well as enacting; and I take it not to have declared any thing against the cases which had been determined; it does not say that such decisions were against principle, and should not have been made: that would not have been consistent with the body of the act, and if such had been the intent of the Legislature, the proviso, "that nothing therein contained should in any sort affect any suit then depending," would have been absurd. I understand the act therefore only to have declared that in certain cases courts of Equity had relieved against mere neglect; that it was fit they should continue to do so; that it was proper there should be some rule in future as to what should be considered mere neglect, and the act thereupon proceeded to lay down that rule, as applicable to cases not then in litigation. It leaves the excepted cases open thus far; that it admits the principles of former decisions, but does not apply to those excepted cases the circumscription laid down by the act. This act is said to have been founded on the decision in the House of Lords on the appeal in *Murray* v. *Bateman*, and at the time of its passing, it was said that that case, as decided by the House of Lords, was considered as amounting to a decision that there could be no relief in any case against mere lapse of time, unless there existed some particular circumstances as a ground for it; and that there was no foundation for what was called the old equity of the country. Something of this appears in what is attributed to Lord Mansfield, who is made to express himself very strongly in the case of *Kane* v. *Hamilton*, 2 *Ridg.* P. C. 180. The manner in which he is said to have expressed himself is, "that it was necessary on the falling of a life, that another should be inserted in due time, and be-

fore the day for renewing is elapsed; and that it is the material and essential part of the agreement, that the renewal should be within six months, and that it was intended to be strictly complied with; and that courts of Equity cannot dispense with the lessee's neglect, in not renewing according to the covenant." But it is evident that the reporter must either have mistaken what was said by Lord Mansfield, or what he said must have been applied to something said at the bar, which was extravagant, and which he thought it necessary to answer. The result of the cases, as said to have been given by Lord Mansfield, is not fairly stated: and the note by the Editor, *p.* 185, on the inference said to have been drawn from one of them, *Pendred* v. *Griffith*, is very well founded. At all events, the decision in *Kane* v. *Hamilton* certainly did not turn on what was said by Lord Mansfield; and upon looking into the cases, it seems to me that they were perfectly well decided, and consistent with the provisions in the act. The courts here had relieved, in cases of this kind, on principles equally applicable, and frequently applied to other cases. The application to the court in such cases, is to compel a specific performance of a covenant to make an estate of land: this is a good ground for application to a court of Equity, upon which it daily exercises jurisdiction; and specific performance ought to be decreed, unless there are particular circumstances which ought to exclude the party from relief. The courts, in all cases of contracts for estates in land, have been in the habit of relieving, where the party from his own neglect had suffered a lapse of time, and from that, or other circumstances, could not maintain an action to recover damages at law; and even where nothing exits to prevent his suing at law, so many things are necessary to enable him to recover at law, that the formalities alone render it very inconvenient and hazardous so to proceed: nor could, in many cases, the legal remedy be adequate to the demands of justice. Courts of Equity have therefore enforced contracts specifically, where no action for damages could be maintainnd; for at law, the party plaintiff must have strictly performed his part, and the inconvenience of insisting upon that in all cases, was sufficient to require the interference of courts of Equity. They dispense with that which would make compliance with what the law requires oppressive: and in various cases of such contracts, they are in the constant habit of relieving the man who has acted fairly, though negligently.

Thus in the case of an estate sold by auction, there is a condition to forfeit the deposit, if the purchase be not completed within a certain time; yet the court is in the constant habit of relieving against the lapse of time: and so in the case of mortgages, and in many instances, relief is given against mere lapse of time, where lapse of time is not essential to the substance of the contract, *vide Pincke* v. *Curteis*, 5 *Bro.* c. 329. *Lloyd* v. *Collett*, *ib.* 469, 4 *Ves. J.* 689, *n*, S. C. *Fordyce* v. *Ford*, 4 *Bro.* C. C. 494. *Spurrier* v. *Hancock*, 4 *Ves. J.* 667. *Seton* v. *Slade*, 7 *Ves. J.* 265. *Jones* v. *Price*, 3 *Anstr.* 924.

Here the time is not essential; for the mere object of fixing a time is to preserve the tenure, and the remedies for the rent and the fine, where it is more than nominal; and if those are preserved, the substance of the contract is performed, though the letter of the contract may not be preserved. The meaning of the parties to these contracts is to secure a continuance of the tenure and rent and payment of the fines, and to prevent a conversion of the tenure, by enjoyment without renewal, into a fee-farm: for, notwithstanding the payment of rent, if there was to be no renewal from time to time, the presumption of a fee-farm would arise; and where the covenant for renewal is upon a pepper-corn fine, which is often the case, the preservation of the tenure, and of the remedies for the rent, must be the only object. In the original contract for such leases, the object on the part of the landlord is the enjoyment of a clear rent, and in many cases, an occasional fine, seldom more than half-a-year's rent, sometimes very small, with the consequences of a fee remaining in him: and on the part of the tenant, the contract is for the perpetual enjoyment of the land, and an encouragement to make such expensive improvements as could not be expected to be made but with a view to such continued enjoyment.

In perfect conformity therefore to principles, clearly established in other cases, the courts here relieved in cases of renewal. Upon examining the cases which have been reported, I find the decisions have been generally in strict conformity to these principles, and have not run into the wildness which has been imputed to them. The first case which I have found reported is *Sweet* v. *Anderson*, 2 *Bro.* P. C. 430. The circumstances are particular, and afford no great illustration of the general question; but the reasons offered in the case on the appeal in support of the decision, show clearly what was then understood to be the

rule of the courts in Ireland on the subject; namely, to give relief against accident, but not against wilful neglect or refusal. In that case the court must have supposed the substance of the contract complied with, as it was equally unknown to both parties, whether the life had dropt or not. It is clear, therefore, the court and the House of Lords did not, in that case, consider themselves as bound by that necessity of strict performance of the covenant on the tenant's part, which Lord Mansfield is supposed to have considered as binding in such cases. The next case is *Ross* v. *Worsop*, 4 *Bro.* P. C. 411: there, as to the life in place of Elizabeth Hoey, the relief was against mere neglect. There had indeed been no change of possession in that case, and one life was in being; and the change of possession is only material as it changes the character of the landlord in respect to the land, when he takes possession as owner. But I do not understand what is said by Lord Lifford, as to there being a legal estate for the equity to attach upon. *Magrath* v. *Muskerry*, *Vern. and Scriv.* 180. The equity arises from the contract; the change of possession is a *circumstance*, as it alters the condition of one of the parties materially; but in any other view, I do not understand this expression. The next case is *Pendred* v. *Griffith*, 4 *Bro.* P. C. 512, which is not fairly stated in the judgment attributed to Lord Mansfield in *Kane* v. *Hamilton*: that was a case of gross fraud, the tenant taking advantage of the ignorance of his own lessor, and taking fines himself from his under-tenants upon the fall of the very lives, upon which he ought to have paid fines himself. That must have been decided as a case of gross fraud, and yet Lord Mansfield is made to state it as dependent only on a lapse of time. The next case is that of *Charles* v. *Rowley*, 6 *Bro.* P. C. 73. in which the only question was, whether the dismissal in 1723 operated as a bar. In *Kane* v. *Hamilton*, 2 *Ridg.* P. C. 180, it is clear there was no pretence for the bill. The next case is *Bateman* v. *Murray*, 2 *Ridg.* P. C. 187, which is very important, as having been so much the subject of discussion, and as having been said to have occasioned the act. The only thing remarkable as to the case is, that it is stated to have been a grant in fee-farm; it was clearly and truly so, with a particular mode of securing the rent, and fines, which may be considered in the nature of rent. But what pretence was there to say, that that was a case of mere neglect? George Murray became entitled upon the death of his father, J. Mur-

ray. He was a receiver for Lady Ross; and if he had not been the tenant, he would, as receiver, have thought it his duty to have given notice to the tenant, and called upon him to renew: having that obligation upon him, and having notice, he must be considered as a tenant to whom the receiver had given notice. Two lives dropped: it was impossible but he must have known the fact, and he concealed it from Lady Ross; notwithstanding which he made a settlement of the lands, and parties claimed under that settlement. Murray denied a knowledge of the death of two of the lives; but he must have known the death of his father, because then his title accrued. Therefore I think his knowledge of that fact, with the circumstance of his being agent to Lady Ross, were very sufficient ground for considering his neglect as fraudulent; and Lord Thurlow considered it as sufficient ground to refuse a renewal in that case, whatever might be done in others. Lord Lifford was of opinion there should be a renewal; the House of Lords thought there should not. There was, besides all this, a very considerable doubt, whether in truth this covenant for renewal had not been purchased by Mr. Edwards, as father of Lady Ross. She insisted it had been purchased by her father, but failed in establishing the fact: but Murray was aware that that was supposed to be the fact; and Lord Thurlow says, the true reason why he did not renew, was, because he feared that the contract for sale in 1730, had barred him of his right. Lord Thurlow considered Murray as having acted fraudulently: there was a contract of some kind or other, and Murray did not choose to ask for a renewal, because if he had, the whole transaction might have been disclosed, and he would not only not have obtained a renewal, but the possession might have been endangered.

Under such circumstances as these, when the tenant does not act fairly, no doubt there should not be a renewal. But where Lord Thurlow says, "Equity will not assist, where the party has lost his right by *gross* laches," what is the meaning of that? Something like what he states to have occurred in the case then under his consideration: the conduct of George Murray, or the conduct of Doctor Saunders, in *Pendred* v. *Griffith*, and cases of the same description. So far as I can collect from the note of what Lord Thurlow said in *Murray* v. *Bateman*, he was far from saying that mere lapse of time will bar.

I confess I so far differ in opinion from Lord Lifford,

that notwithstanding the passing of the Tenantry Act, I should hold myself bound to refuse a decree for a renewal in *Murray* v. *Bateman*, if that case had come before me after the act; because I think there was a fraud. The tenant was agent to Lady Ross, and bound to discover the deaths of the *cestui que vies* in the several leases of her estate, and to give notice to her other tenants. He was bound therefore to take notice himself of the dropping of lives in his own lease: he was bound regularly to collect the fines of the other tenants, and to pay his own. I take that to be a case, where the act meant there should be no relief, that is, where fraud was practised; and such conduct in an agent, for his own benefit, is fraud.

These are all the important cases which have occurred to me, for the purpose of discovering what was the principle upon which courts proceeded upon the act; and I think the principles stated by Lord Thurlow are clear and plain; that "equity will relieve where there is mere lapse of time unaccounted for, without misconduct in the lessee, or where the lessee has lost his right by fraud in the lessor. —2 *Scho. and Lef.* 682. *App.*

Observations on the Case of Lennon v. *Napper.*

This case is a judicial reading by Lord Redesdale when Chancellor of Ireland, on the Tenantry Act; and the several reported cases which preceded that statute. Its several positions have already been applied to the several cases to which each refers in conjunction with other dicta and considerations applicable to each case.

The next case is:

Jackson v. *Saunders.*

1802. Nov. 30. Dec, 20, 22.—1804, Nov. 20.

Under the Tenantry Act, 19 and 20 Geo. 3 c. 30, what shall be deemed *reasonable time after demand*, for paying renewal fines, must in all cases depend on the circumstances, and

John Weaver being seised in fee, in 1699 demised the lands of Cumer to Richard Lamb and John Lamb, for three lives with a covenant for perpetual renewal. Richard and John Lamb some time after made partition, by which each became entitled to a separate portion of the lands. Weaver's estate afterwards vested in Robert Saunders (under whom the defendant claimed,) who in 1724, upon the application of Richard Lamb for a renewal of his part, demised by indenture the north-west part of the said lands to the said Richard Lamb, for the lives of

Edward and Richard Lamb and Thomas Mitchell, with a covenant, "that as often as it should please God to take away by death any of the aforesaid Edward Lamb, Richard Lamb, and Thomas Mitchell, the lives in said indenture mentioned, the said Robert Saunders, his heirs and assigns, should put in another life of such person as should be named by the said Richard Lamb, his heirs and assigns, still to keep up the three lives in the then present demise:" and the said Richard Lamb, covenanted, "that within four months after the death of any of the before-named Edward Lamb, Richard Lamb and Thomas Mitchell, he would nominate one other person whose life should be added to said indenture, and pay to said Robert Saunders and his heirs one full half year's rent of said lands; and if said Richard Lamb, his heirs or assigns, should neglect or refuse so to do, then the said Robert Saunders should be allowed interest for said fine from the death of the person or persons so dying." In 1755, Edward and Richard Lamb being dead, Morley Pendred Saunders, in whom the reversion was then vested, granted a new lease for the lives of Thomas Mitchell, Henry Palmer, and Robert Palmer, with a covenant for perpetual renewal, to Jackson, in whom the tenant's interest in both the north-west and south-east parts of said lands had vested, and under whom the plaintiff claimed. Henry Palmer died in 1787, Thomas Mitchell in 1793, and Robert Palmer in 1800.

circumstances previous, as well as subsequent to the demand, are to be taken into consideration. Therefore when the demand was on the 6th Oct. a tender on the 20th of March following was not within reasonable time; the tenant having had intimation for two years before that payment of the fine was expected, and having neglected to pay it.

The demand required by the statute need not be in writing, nor is any precise form prescribed for it.

About 1799 several applications were made to plaintiff on the part of the defendant; and particularly on the 1st of March, when plaintiff was renewing his lease of the south-east part of Cumer, he was requested by the defendant's agent to pay the fines and renew the lease of the part in question; and at another time, the defendant having met the plaintiff in the hall of the Four Courts, required him to pay the renewal fines then due, which he promised shortly to do. Some time in March, 1799, Mr. T. Saunders, the law agent of defendant, prepared a draft of a new lease, and left it at the office of the plaintiff's agent, Mr. P. Jackson, but it appeared that Mr. Jackson did not see it until 1st November, 1800. On the 9th July, 1800, Mr. T. Saunders having heard that the plaintiff was about to execute some instrument for the purpose of raising a sum of money, wrote a letter informing him that in consequence of several applications having been made without effect, the defendant could not, and would not renew the

lease, unless the renewal fines were immediately paid; in answer to which, plaintiff, by a letter dated 17th July, stated that he should be writing to Mr. Peter Jackson on other business, and would give directions to have it done. A few days after Mr. T. Saunders communicated to Mr. Peter Jackson the contents of said letter, at which Mr. Peter Jackson seemed surprised, and said that he had that morning received a letter from the plaintiff, in which he did not mention the payment of said fines, but said he would not execute said deed, unless he should, out of the money to be raised, receive £300 for the education of his daughter. In August, 1800, Mr. T. Saunders applied again, by letter, to Mr. Peter Jackson, saying, "that as so much time had been lost, he could not avoid proceeding as the act prescribed, to prevent the plaintiff's obtaining any renewal of the lease;" which letter not having had effect, Mr. T. Saunders, on the 6th of October following, made a personal demand of the renewal fines from Mr. Jackson, under a power of attorney from Mr. Saunders, authorizing him to make such demand. Mr. Saunders then brought his ejectment as of Michaelmas Term, 1800, which was served on the 15th of January, 1801. On the 20th February following Mr. Jackson wrote to Mr. Saunders, desiring to see the opinion of counsel which he had taken; and stating that the fines were then ready: and on the 14th March, Mr. Peter Jackson, wrote again, to signify that the plaintiff was then ready to pay the fines, and that as the ejectment was irregularly brought, he would not attend at the assizes. However, the record was brought down and came to trial at the next assizes, when the plaintiff at law was nonsuited for want of an appearance by the defendant to confess lease entry and ouster. On the 29th March, 1801, plaintiff tendered to defendant the amount of renewal and septennial fines and interest, together with the rent in arrear, and also tendered leases to be executed, which defendant refused. On the 20th April, 1801, this bill was filed, praying a renewal for the lives therein named, on payment of all rent, arrears of rent and renewal fines, and an injunction.

This case was argued on the original hearing, by Mr. Burston, Mr. Blackburne, and Mr. Parsons, for the plaintiffs; and by Mr. Saurin, Mr. Burne, and Mr. F. W. Greene, for the defendant: and on the re-hearing, by Mr. Burston, Mr. Ball, Mr. O'Driscoll, and Mr. Parsons for the plaintiff: counsel for the defendant not being called

upon to argue it. A preliminary question was made in the case; whether the covenant in the lease of 1724 ought not to be considered merely as a covenant for adding three lives in the place of the three lives therein named, and not as a covenant for perpetual renewal; but the Lord Chancellor having expressed his opinion, that the lease of 1724 was to be considered only as an instrument of partition, and that it did not make any change in the tenure created by the lease of 1699, that point was not pressed. The other and principal was, whether under the circumstances of the case, and the provisions of the statute, the plaintiff was barred in his right of renewal.

Argument for plaintiff.

Argument for the plaintiff. The constant and uniform practice of courts of Equity in Ireland, antecedent to the passing of the act of the 19 and 20 Geo. 3, commonly called the Tenantry Act, was to relieve tenants claiming under covenants for renewal against mere neglect or lapse of time, on indemnifying the landlord. The principle on which the Irish courts proceeded are laid down and explained by Lord Lifford in the case of *Boyle* v. *Lysaght*, in the House of Lords, 1 *Ridg.* P. C. 401.

It is computed that one-seventh of the whole landed property of Ireland is held under leases of this description: they have been uniformly the subject of family settlements, of mortgages, and of other securities for money; and the owner of such an estate has on all occasions been as liberally dealt with as if he were owner of the fee. In general, the landlord can sustain no other injury by the delay of payment in this case, than in any other where he lies out of his money; and where the tenant has not conceived any fraud, such as representing lives to be in existence after they had dropt, or the like, (of which nothing is pretended in this case;) but where there is nothing but a mere neglect of payment, it is submitted that the ancient principle of relieving against lapse of time, on full indemnity being made to the landlord, as it is to be found recognized by decisions in this country, supports the plaintiff's claim to a renewal; and it would be highly dangerous at this day to narrow a principle on which so much property rests. Lord Lifford, in the case of *Boyle* v. *Lysaght*, says, that when the case of *Murray* v. *Bateman*, 1 *Ridg.* P. C. 187, was before him, he had consulted the judges, the ablest men and oldest practitioners in the hall, and that they had agreed the uniform practice was to decree renewals on the terms of paying septennial fines, introduced by Lord Chief

Gilbert, in *Anderson* v. *Sweet*, 2 *Bro.* P. C. 480, in all cases except where there was fraud or dereliction on the part of the tenant. On this principle he founded his decree, recognising and acting upon what has been called the old Equity of the country; but upon an appeal, his decree was reversed, 5 *Bro.* P. C. 20, 2d ed., by the British House of Lords, and this old equity overturned. This decision, and the doctrine laid down by the Lords on that occasion, caused an alarm in Ireland; to quiet which, this statute was introduced; it recites the original equity of the country, that the rights of tenants should not be defeated by mere neglect, where no fraud was intended; and then, inasmuch as this neglect might be indefinite, the statute appoints a certain act to be done by the landlord, viz. a demand, and provides that if payment is not made within reasonable time after such demand, the tenant shall forfeit his right of renewal. Under this provision, no mere neglect can bar the tenant; but the landlord has it in his power to put an end to that neglect, by making a demand: that demand draws the line, and every thing antecedent to it ought to be put out of the mind of the court, or else the tenant has not the benefit of the act. The 16th of October, 1800, is the first day on which there is any pretence of a demand; and even as to the demand alleged on that day, it may be questioned whether there be such *proof* as the statute requires: it is not made in writing; it is not made by the landlord himself, but made under a power of attorney, which is not in proof: but admitting, for argument sake, that the demand is sufficient within the statute, then the 16th of October is the *terminus a quo* the neglect of the plaintiff is to be counted; (for it cannot be said that any of the previous negotiations amounted to the demand required by this statute;) and the question is, whether he tendered within a *reasonable time* after the 16th October; what shall be deemed *reasonable time*, not having been fixed by the legislature, but being left to the court to determine on the particular circumstances of each case. The demand itself admits that all former transgressions are forgiven, and the tenant is then entitled to a renewal: even if there had been fraud, a subsequent notice from the landlord would have been a waiver of it. The whole time to be accounted for then, is, from the 16th October to the 29th March following, when the rents, arrears, &c. were tendered, little more than five months; and for four months of this time the lessor has carved out satisfaction for the delay, for the co-

venant is that the lessee should nominate a life and pay the fine *within four months* after the death of the *cestui que vies*, and that if he neglected or refused so to do, the lessor should be allowed interest for said fine *from the death of the cestui que vie.* Courts of Equity have relieved even where the covenant was general, that the tenant should be barred on failure of payment; how much a stronger case for relief is this, where the covenant itself allows a delay of four months. It will be admitted that if the plaintiff had come in with the fines, &c. on the last day of the four months, he would have been in time; then it is harsh to say that his delay for the very short period (from the 16th of February to the 29th March) should deprive him of relief. But this delay, short as it was, might have been caused by the conduct of the defendant himself. It is conceived that the landlord ought to be ready, during every moment of the period during which neglect is imputed, to receive the fine if tendered by the tenant; now here, Mr. Saunders, before the four months had expired, brings his ejectment; an act, which if not equal to a refusal to accept the fines, at least might well induce a belief in the tenant that it was unnecessary to tender the fines, as he might fairly suppose they would not be accepted: the case might have been very different if Mr. Saunders had, during this whole period, shewn a disposition to accept the fines.

See what the legislature has provided in the case of ejectment for non-payment of rent; (11 Ann, c. 2, s. 2.) the tenant who has put the landlord to the trouble of prosecuting an ejectment, however litigious, however dishonest he may be, yet is allowed six months after execution executed within which time he may redeem. Rent is the annual profit arising out of land, to the regular receipt of which the landlord looks for his support; and as it is payable at stated periods, the tenant has notice when payment will be expected of him; whereas renewal fines are uncertain and contingent; they cannot on the one hand be looked to by the landlord as a source of regular supply, nor on the other hand, can the tenant be prepared to pay them with so much punctuality as rent. Then if six months be a reasonable time for payment of rent, it may fairly be adopted by analogy as a reasonable time under this statute, in cases where no precise time is determined by the contract; agreeably to what was intimidated by Lord Clare, in the case of *Deane* and another v. the *Marquess of Waterford*, 1 *Scho. and Lef.* 451, *n.* Again, in foreclosure cases, courts of Equity

uniformly allow six months to the mortgagor to redeem, even after the most litigious conduct on his part; nay, they will extend the time, by keeping the sale open until a fair price can be had for the estate, rather than suffer the debtor to be ruined; and it is unreasonable to call on this court to adopt the same indulgent principle, for the purpose of establishing tenures of this description which were created with the intention of making them perpetual, instead of establishing a rule which, for the delay of a very few weeks or days, may ruin not only the tenant himself but his family and his fair creditors. And Mr. Saunders has the less reason to insist on the rigour of the law, because he does not inherit from the lessor, but is a purchaser of his interest, and no doubt had credit for this lease as for a perpetuity.

Lord Chancellor.—I have thought a great deal, and with no small anxiety on this subject. I have had occasion to consider the principles on which cases of this description were to be determined independent of the statute, in the case of *Lennon* v. *Napper*, (2 *Scko. and Lef.* 682. *ap.*) where there were very extraordinary circumstances arising previous to the statute, and not to be affected by it.

I think the statute is to be considered as having set the matter at rest, by drawing a line which the legislature considered beneficial, both to the landlord and the tenant: beneficial to the tenant by providing that mere neglect should not injure him; and beneficial to the landlord by providing, not only that fraud of any description, but also that wilful default, (by which I conceive was meant non-payment of renewal fines within a reasonable time after demand,) should bar the tenant, so that the landlord should be thus able to put a limit to what would otherwise be indefinite. The legislature thought, I must presume, that under the circumstances which affect property of this description, and which are necessarily so extremely various, it would be very difficult to draw a precise line as to what should be deemed "reasonable time;" but that it must be left, in each case, to be considered upon its own circumstances. In the discussion of this case, I am not merely to consider what are the hardships suffered by Mr. Jackson, or what the advantages gained by Mr. Saunders; whether the former be a distressed or an opulent man, or whether the latter inherits from the original lessee, or is a purchaser of his interest. I am to consider what is to be the rule for courts of Equity to act upon in construing

this statute; and I think I can lay down no rule on the subject but this, that there shall be no relief, if the conduct of the tenant be that of a man who has not used due diligence, after he has had sufficient intimation that such conduct would be insisted upon by his landlord, as excluding him from the benefit of renewal. I think it extremely material that this should be so understood in the country; the decision of this case necessarily affecting a variety of cases, not only as they now stand, but as they may in future stand, and affecting the value of the property of every landlord who has tenants of this description; for the value of such property materially depends on the facility with which landlords can enforce payment of the fines, and a continuance of acknowledgment of the tenure by acceptance of new leases. This acknowledgment of tenure perhaps is of more consequence than the actual payment of the fines; and the power to compel payment of the fines, and acceptance of new leases, is the only mean by which the acknowledgment of tenure can be effectually enforced. In this respect landlords are even still under great difficulties; for if a life drops, the contract requires renewal, and the fact of that life having dropt, is infinitely more likely to be within the knowledge of the tenant who had the nomination of it, than of the landlord; and he is therefore put under great difficulty in being obliged to ascertain that fact. Yet this he must do; for (unless there be something of fraud,) he can in no way compel the tenant to renew the tenure under the penalty of being excluded, but by making the formal demand, which must proceed on his previous knowledge of the death of the *cestui que vie;* and then if the tenant neglects or refuses to renew, he is under the further difficulty of preserving the evidence of such demand, until the dropping of the remaining lives and expiration of the existing lease.

In the present case, the first of the lives dropt as early as January, 1789. The landlord probably was ignorant of that fact; whether the tenant knew of it or not, does not appear. Now, suppose the landlord had called on the tenant to renew, and had made a formal demand of the fine; yet he would have been put under the difficulty of preserving the evidence of that demand, as long as the lease continued by the existence of the other two lives. This is a very considerable difficulty, and I know not how it is to be obviated, unless courts of Equity will entertain a new jurisdiction, and permit the landlord, after making such demand, to file a bill to exclude the tenant from the benefit of re-

newal; and even in this proceeding he would be put to great expense in barring the right of the tenant.

Another life dropt in 1791, and no attempt was made by the tenant to renew. There were then two defaults on the part of the tenant, which defaults I am to attribute to mere neglect. It is a neglect however of long continuance.

On the 1st March, 1799, the lease of the other moiety of these lands was renewed by Mr. Saunders, and Mr. Jackson was then in truth called on to renew for the moiety in question, though no formal demand was made on him; nothing that would operate to exclude him from renewal under this act. But Mr. Saunders, at the time the lease of the 1st March, 1799, was executed, stated to Jackson, which he did not deny, that Saunders was informed two of the lives in the lease of this moiety were gone; and desired to know when Jackson would be ready to pay the renewal fines. Now, really, if the act of Parliament were out of the case, I ought to hold that there was a mere neglect on the part of Jackson, commencing in March, 1799; and the transactions which have happened subsequent to that time could properly be argued upon by Jackson in a court of Equity only thus: "true, I was called upon in March, 1799, to pay this fine: true, I have not paid it, nor taken any steps to pay it; but Mr. Saunders has been from time to time indulgent to me on the subject, and it was this indulgence that led me to omit making a formal tender." But let us suppose the act had not passed, and attend a little to the subsequent circumstances. In the course of the year 1800, there is an express promise on the part of Jackson to pay the money, and a reference to his own agent, Mr. P. Jackson, as if the money were actually in his hands: Saunders's agent thereupon calls upon Jackson's agent for the money, who answers that he has not the money, and that Jackson has misrepresented the facts. A correspondence takes place between Jackson and his agent; and Jackson directs that the very money which the agent wished to apply to the renewal of the lease, should be applied for the benefit of his daughter. I should think, if this act had not been made, that these circumstances of misconduct on the part of Mr. Jackson, taking them in the most favourable light, would incline a court of Equity not to assist him against the forfeiture of his right of renewal, if the case had rested on these circumstances. Then consider these circumstances in reference to the act, and the subsequent transactions. On the 9th of July, 1800, a letter

is written by R. Saunders to Jackson, the purport of which was, that having done nothing but amuse and deceive Mr. Saunders, he would be under the necessity of taking proceedings under the act, to exclude Jackson finally. Jackson, in his answer to this, on the 17th July, says, that he would shortly be writing to his solicitor, Mr. P. Jackson, and would give directions to him to have the fine paid. Mr. R. Saunders waits on Mr. P. Jackson, in consequence of this letter, but no fine is forthcoming. It is said that I am not to take notice of these previous dealings between landlord and tenant. Nothing could be more mischievous to tenants than to hold this, for the result would be, that the first step every landlord would be compelled to take, must be to give notice. If all his prior indulgence is to be turned against him, it would be absurd to grant any; and it would be the duty of every agent employed to manage property of this kind, to serve the formal demand in the first instance, which might often be very injurious to the tenants. I think therefore that I must take all these circumstances into consideration in forming a judgment whether the default of Jackson, after demand, ought to be deemed wilful default within the meaning of the statute.

The statute has not prescribed any form for the demand. It is good, though not in writing.

In the month of August, 1800, Mr. R. Saunders writes to Mr. Jackson, complaining of his conduct, and stating that he could not without doing material injustice to his client, forbear to proceed under the statute; and really enough had passed to provoke him highly, considering all the indulgence that had been given to Mr. Jackson, and that an actual, though not a formal, demand had been made on him near eighteen months before. Then in October, 1800, a demand is made, which I take to be a sufficient demand under the statute; it being a demand intended to exclude Jackson from a renewal, in case of noncompliance, and the act not having prescribed any particular form for such demand. The notice was for renewal only of two lives, Saunders being then ignorant, but Jackson knowing, that the third life had then dropt. It is said that there was great liberality in Jackson's informing Saunders that the third life had dropt; but as to that, it was economical in Jackson to renew for the three lives by one lease, rather than incur the expense of separate renewals. And when an argument is founded on the smallness of the sum to be raised, I think it turns the other way; for the smaller the sum, the less difficulty would there be in raising it; and that applies particularly when I hear

an analogy attempted to be drawn from the case of rents, which are supposed to be a full value for the lands, in those cases at least which apply to the immediate occupying tenant; and an analogy from mortgages, which, generally speaking, bear a very considerable proportion, not merely to the rent, but to the value of the fee-simple itself. Such arguments appear to me to be used without attending to the rights of the landlord and tenant under these leases; which are, that the landlord should regularly receive that which he had stipulated to receive; and that the tenure should be kept up. For, I know no reason why these leases ever came into practice in this country, instead of fee-farm grants, but that the situation of the country, the habits of the people, and the manner in which rents were paid, made it more beneficial to the landlord. I have heard that landlords are not willing to convert this tenure into fee-farm grants, because they have such difficulty in recovering their rents when compelled to enforce payment by the ordinary means for the recovery of such rents. If proper means were found for the recovery of rents received in fee-farm grants, they would be more beneficial to the country than these leases, the nature of which leads to continual litigation. When it is considered that these leases are often granted by persons who have themselves renewable interests, and that the means which such persons have to pay their rent and fines payable by their tenants, who may themselves have underlet to others, and such under-letting repeated four or five times; if the person who has the reservation on the last under-letting, (and who is to renew with his immediate landlord, and he with another, and so on) is to encounter a considerable delay after a demand of this description, I do not know what security the intervening persons have for their property; for if the person last holding withhold payment from his immediate landlord, all the intermediate tenures may be put in great hazard. I therefore think it desirable that somewhat of strict rule should be held on persons who have estates of this description, in order to make them diligent; and this I take to be the true meaning of the act, that the landlord should not be at liberty to take advantage of mere neglect, but that he might avail himself of wilful default; that is, non-payment of the money within a reasonable time after demand.

Considering the nature of this tenure, it is necessary that persons holding under it should be obliged to use diligence in paying renewal fines.

What is reasonable time must in all cases be considered according to the circumstances. In all mercantile trans-

What is reasonable time must

actions, the holder of a bill must tender it on the day it becomes due; if not paid, it must be protested instantly, and notice given forthwith, or as soon as circumstances will permit: if a draft is given on a banker, it is to be demanded on the day it is given, and if it be not, it is at the risk of the party holding the draft, and all this depends upon what is due diligence in the particular case, which is to be judged of by certain rules and by the practice and habits of the people, and in some cases must be left to the fair discretion of the jurors.

always be considered according to the circumstances.

In a case similar to the one now before me, where the tenure happens to be complicated in the manner I have mentioned, the regularity of payment of all the different gradations must depend on the regular payment of the holder under the last demise. And although in the present case the tenure is not complicated, yet I must have regard to such cases, in considering what is to be the effect of a demand under the statute, and what is to be a reasonable time afterwards for compliance with that demand. The effect of the demand is, to inform the tenant that the life is dropt, if he does not know it before, and to apprise him that it it is expected he will use due diligence in paying the fine and accepting a new lease. Then what is *due diligence?* It is payment as soon as circumstances will reasonably permit. For instance, if a demand be made on a tenant when resident in a foreign country, or at a distance from his own home, the time within which it would be possible for him to comply would be very differeut from what it would be if he were on the spot: a variety of qualifying circumstances may make that due diligence in one case, which is not so in another.

Due diligence is payment as soon as circumstances will reasonably permit.

The 6th October is the day on which I must consider Mr. Jackson to have been informed that due diligence was immediately to be used by him. He had had two years previous notice that the fine was due, and that his landlord expected payment and required him to renew; he had promised to pay long before, and he had broken his word: the consequence seems to me to be, that he was bound, by the indulgence that had been before shewn to him, to use his utmost diligence from the moment the formal demand was made. Ought he not immediately to have written to his agent that he had not the money, but that he must procure it forthwith, to pay Mr. Saunders? Did he do any thing like this? All we we know is, that early in the following November Mr. P. Jackson says he found

in his office a draft of a lease, which evidently had been prepared some time before, as it proceeded on the supposition of two lives only having dropt; but having found this draft, he does nothing in consequence. Then Michaelmas Term elapses, during which time it is clear from the evidence, that Jackson gave no direction to his agent in consequence of the notice of the 6th of October. On the 15th January, 1801, the ejectment is served: even then there is no application, no tender of the money. There was time enough for Mr. Jackson to have procured the money in the interval between the 6th October and the 15th Jan. and he ought to have procured it; it was only at the rate of half a year's rent reserved on the original lease for each life, with the usual charge of interest and septennial fines, and he could have had no difficulty in raising it, if due diligence had been used.

On the 20th February, 1801, an intimation is given that the money is ready; but it does not appear to have been produced. However, I will take it for granted that it was ready: it is tendered on the 20th March, 1801; I cannot take any thing which previously passed as an actual tender amounting to payment; I can take the letter of the 20th February only as evidence that the money was then in a state of preparation: probably it was prepared in bills; and if the bills were good, and no objection made on that account by Mr. Saunders, it would be too much perhaps to say that that would not have been sufficient: however, that was not the case. But suppose it had been; is the space of time which had been suffered to elapse between the 6th October and the 20th February, a reasonable time after the 6th October? I think not. Jackson not only did not, in my opinion, use due diligence, but did not use common diligence; did not use the fair diligence which in honest dealing between man and man ought to have been used. He plainly meant to delay the payment as long as by any means he could delay it, perhaps fancying he should still obtain the same indulgence which Mr. Saunders had offered him from March, 1799, when he was first called upon to renew, till the 6th October, 1800, when the formal notice was given; a period of above eighteen months.

Under these circumstances, I think I should do a great mischief to the public to hold this a tender in a reasonable time within the meaning of this act. I think a large time may be allowed in some cases; a short time in others: all must depend on the particular circumstances of the case.

If we were to say that four or six months, or any specified period, was to be a limitation of the time, (six was insisted on,) I must apply that as a rule in all cases; in those where it would be unreasonably long, as well as where it would be unreasonably short. The act has specified no time, and I am called upon arbitrarily to fix a time to give a fixed rule by the decision of a court of justice, where the legislature has thought fit (and wisely as it seems to me) to give no fixed rule. It is safer and better to hold that reasonable time, according to the apparent intent of the act, is in all cases to be judged of by all the circumstances of each particular case; and if a tenant, after a formal demand, thinks fit to rest on his oars, and continue that neglect, which according to the letter of his contract would deprive him of his right, the continued neglect is to be considered not a mere neglect, but a wilful default.

The act provides, in case the landlord finds any difficulty in discovering his tenant, so as to make a demand of the fine, that a demand made on the lands from the principal occupier, together with a notice of such demand inserted for the space of two months in the London and Dublin Gazettes, shall be considered a *demand* within the act. Now suppose a tenant, abroad in his Majesty's service, or in the East Indies, and that the landlord does not know where he is, (for if he does know, it would be very difficult to say that he must not make the demand personally,) and proceeds under this clause; is reasonable time after this demand, of which the tenant may remain utterly ignorant of it, to be computed in the same way, if the tenant remained utterly ignorant of it, as if the tenant had actually heard of it immediately from the occupier to whom it was given, or had seen it in the Gazettes, and had set his landlord at defiance? Is the fine in such a case to be paid within the same time after demand, as it ought to be, if the tenant were actually on the spot? or is he in such a case to be precluded from the benefit of renewal after a fixed period of time, although the moment he knows what has happened he is ready to pay the fine? On the other hand, though the tenant were in the East Indies, yet if it appeared that he knew of the demand, and yet took no step to get the money, and procure the renewals, his absence would not excuse him from the consequences of wilful default. There may be many other circumstances affecting what shall be deemed reasonable time. The property may be in litigation, and the notice given to a trustee, who cannot act

without the direction of the court, and perhaps cannot raise the money but under the authority of the court. In such a case, six months might not be a reasonable time. Therefore all these cases must be considered upon the good or ill conduct of the tenant, in paying or not paying the fine, to convert that which was mere neglect into wilful default: and it would be mischievous to both parties to give indulgence beyond what is necessary, or to withhold indulgence where necessary by adopting any fixed period of time. The best thing for tenants having estates of this kind, is, to renew as the lives drop, unless they intend to defraud their landlord: and where these interests are in settlement, I think it particularly important to compel renewal from time to time; for the tenant for life never will renew as long as he can avoid it, because if the compulsion does not happen in his time, he puts all the rents and profits in his own pocket. The same observation will apply to estates in the hands of creditors: it is better both for subsequent creditors and for those in remainder under settlement, to compel regular renewals by the persons in possession.

On the first hearing the decree was, "that plaintiff's bill should stand dismissed, with costs, save as to so much thereof as relates to the construction of the covenant for perpetual renewal contained in the original lease of 12th November, 1724, in the pleadings mentioned; and as to so much of plaintiff's bill as relates thereto; let the same stand dismissed without costs."

Reg. Lib. xlviii. 447,

Former decree reversed.

On the rehearing, the former decree was affirmed, but without costs.—1 *Scho. and Lef.* 448. *ap.*

Observations on the Case of Jackson v. *Saunders.*

A second reading on the Tenantry Act, by Lord Redesdale.

THE case of *Lennon* v. *Napper* which precedes this case, gives the principles on which Lord Redesdale considered that cases of renewal were to be determined independent of the statute: that case also gives an accompanying view of the statute itself; but this case of *Jackson* v. *Saunders* gives a more enlarged and special view of his Lordship's construction of the statute unmixed with any other view than of the statutable equity of Ireland, which was then, is still, and is likely to continue as the practical law on this subject. The rule of construction which his Lordship herein laid down was, that "there shall be no re-

lief if the conduct of the tenant be that of a man who has not used due diligence after he has had sufficient intimation that such conduct would be insisted upon by his landlord as excluding him from the benefit of renewal." Due diligence is payment after demand as soon as circumstances will reasonably permit; and wilful default is non-payment of renewal fines within a reasonable time after demand; and such wilful default or fraud amounts now under the statute to a forfeiture of the right of the tenant to a renewal.

Rule of construction on that statute.

Wilful neglect, what?

The "circumscription," as Lord Redesdale calls it, of the old equity of Ireland, forms the essential difference between that equity and the present *statutable* equity which has been the law of Ireland since the enactment of the Tenantry Act: that is, the old indefinite indulgence to the tenant has been, as Lord Manners said in *Keating* v. *Sparrow*, made *definite* by the statute: the landlord can circumscribe it, or put an end to the indulgence by a demand, and this demand may be made by himself or his agent, and by writing, or verbally, and in any form of words; provided they express a demand of the renewal fines coupled with the expression of "an intention to exclude the tenant from renewal in case of non-compliance:" and such demand may be made after the drop of any one of the lives: and a non-compliance thereafter, within reasonable time, will forfeit the tenant's right to a renewal. It will not of course give the landlord the estate, *immediately*, but it will *eventually:* it will not enable the landlord to bring his ejectment, because nothing but the drops of all the lives, or the extinction of the legal estate, can do that; but it will take away from the tenant his equitable right to a renewal, and enable the landlord to secure to himself the possession of the estate by his ejectment, so soon as the legal estate is extinguished; and to defeat the tenant's bill in equity, should he bring one for a renewal after the drop of the three lives, or two, or one; in fact fraud or wilful default, after demand on the drop of any life, forfeits the tenant's *equitable* title, and enables the landlord to resume the possession by his ejectment whenever the legal estate may expire.

It is the interest and right of landlords, and of course it is the duty of agents, to enforce renewals on the drops of each life, by making a formal demand of the fine under the statute in such a manner as that the evidence thereof may be best preserved. I do not mean that the demand, according to the statute, should be made in the first instance. I

It is the duty of agents to enforce renewals.

think it better that there should be previous demands, with an intimation accompanying them, that in the event of non-payment a demand should be made under the statute, because the antecedent conduct of the tenant previously to the statutable demand in respect to the non-compliance with the request of payment, would be taken into account by the court in judging whether his neglect was wilful or not; an inference collectible from his whole conduct respecting the non-payment of the fine after request so to do, and an inference which would decide his title to a renewal.

The fines are the preservatives of the tenure.

The duty of agents to enforce renewals will appear still stronger from these circumstances; the value of the landlord's property depends on the facility with which he can enforce payment of the fines and acknowledgment of the tenure. The acknowledgment of the tenure, that is, that the *fee* is in the landlord, depends on the acceptance of the new leases and the payment of the renewal fines. The rent, without the fines, would not be sufficient to preserve the evidence of the tenure, that is, of the fee being in the landlord; if rent only were paid, and there were no evidence of renewals or payments of fines; the state of things in such a case would create a presumption of a fee-farm being in the *tenant*: now the tenure, that is, the fee in the landlord, may be an important consideration in the value of the property, and the renewal fines are the preservatives of that tenure; and the renewal leases the documental acknowledgment thereof.

The landlord can only compel the tenant to the renewal of the lease on the drop of the single life, by reiterated demands of payment, and finally a formal one under the statute; a non-compliance with which forfeits the right of renewal: this mode can only be adopted on the ascertainment of the drop of the life by the landlord, a fact more likely to be within the knowledge of the tenant, and therefore it would be always desirable that the new lives, nominated by the tenant, should be those of persons in some elevated situation, whose death must be a matter of general notoriety.

Payment of fines material also to the tenants, else intermediate interest may be lost.

Diligence in paying renewal fines is also further necessary, from the circumstance that these leases are often granted by persons having themselves renewable interests, whose means to pay their rent and fines arise from the rent and fines payable by their tenants, who may also have underlet; (for here the subletting act does not apply;) and if the person having the reservation on the last under-letting, and

who is to renew with his immediate landlord, is to encounter a considerable delay after a demand of this description; the intermediate interests may be put in great hazard, and much injury done to *bona fide* incumbrancers and innocent third persons.

Rents and fines, what?

The relation of landlord and tenant may, for our present purpose, be considered in two points of view, either as resulting from *contract*, or the principle of feudal *tenure*. In the former case the contract is called a *lease* or *demise*.

The parties to such contract are the owner of the soil and the farmer or terre-tenant, who are sometimes called lessor and lessee, and sometimes landlord and tenant. By this contract the landlord grants to the tenant the possession of the land for life or lives, for a number of years certain, or at will. The tenant, on the other hand, usually engages by the same contract to pay, in consideration of such grant, a certain sum of money, or other certain recompense, at stated periods during the term, which payments are called *rents*. The parties, however, may dispense with rent by agreeing to the payment of one entire sum on the completion of the contract, which is usually called a fore-gift, or *fine*, it being the earnest of the conclusion of the contract. It is also common for the tenant to pay his consideration partly by fine and partly by rent; but fines and rents are no essential part of the contract; as there may be many beneficial considerations for granting a lease without reserving any rent; and if, from bounty to the tenant, the lessor chooses to forego all advantage to himself, it will be no objection to the grant, singly considered, that it is of a voluntary nature.

A fine or fore-gift is the earnest of the conclusion of a contract between the landlord and tenant.

A renewal of a lease for lives taken by tenant for life, is a trust for the benefit of those in remainder.

The next case is *Bowles* v. *Stewart*, July, 1803, which is one of considerable extent; and in many parts (as Lord Redesdale remarks) of considerable obscurity; its bearing is collateral and remote on the subject of this treatise; nor is it necessary farther to refer to it, than as supplying one legal proposition referential to the subject of renewals, namely, that "a renewal taken by a tenant for life of a lease for lives, is a trust for the benefit of those in remainder." This case is reported at large in 1 *Scho. and Lef.* 209.

The next case is:

Griffin v. *Griffin.*

16th May, 1804.

An infant cannot avail himself of his infancy to excuse the non-assertion of his right under an executory agreement made with his ancestor, where the immediate performance of his part of the contract is essential to the in-

THE bill prayed that an agreement for a lease made between the father of the plaintiff and the defendant Leslie, might be carried into specific execution, or that the lease granted by Leslie to the husband of the defendant Griffin might be decreed a trust for the plaintiff, and an account of the rents and profits, &c.

In 1775, Mr. Leslie agreed by parol with the father of plaintiff, to grant him a lease of lives renewable for ever of the lands in question, and gave him possession accordingly, the tenant agreeing to lay out a certain sum on the premises within three years. In 1777, (about a year and an half after the agreement,) the father of the plaintiff died, leaving plaintiff, his eldest son and heir at law, an infant* of

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* The following is the statute respecting Renewals, in case of Minors, &c. &c. :—

11 Anne, c. 3.

An Act to enable Guardians ond others to renew Leases for Lives.

"WHEREAS several persons have heretofore made, and hereafter may make, leases for one or more life or lives, of several lands, tenements, and hereditaments in this kingdom, with covenants and agreements in such leases for renewing the same from time to time, on the tender and payment of some fine certain, on the death of any life or lives, in such lease or leases mentioned, by adding such one or more life or lives, on failure of the life or lives in being, within the respective times in such agreements and covenants mentioned, as the several lessee or lessees in such lease or leases shall nominate : and whereas, through one pretence or other, on the fall or failure of any life or lives in being, the lessee or lessees are greatly delayed, before he or they can obtain any renewal according to the covenants and agreements in their leases, to their very great discouragement: for remedy whereof be it enacted, that if it shall so happen that any person or persons, who in pursuance of such agreements for renewal in such leases contained, or to be contained, ought to make such new lease or leases as have been or shall be agreed to be made, shall be under any disability so to do by reason of infancy, coverture, or *non compos mentis,* that then and in every such case, (that is to say) in case

Where persons who ought to renew leases for lives are under disability.

two years old. Maurice Griffin (the husband of the defendant Mary Griffin, and uncle to the plaintiff) thereupon took upon himself the management of the family affairs under a letter of attorney from the plaintiff's mother, but was neither executor nor admininistrator of the deceased, nor guardian to the infant.

terest of the other contracting party.

Renewal of a lease taken by a trustee, shall

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of disability by reason of infancy, or being under age, by the direction of the high court of Chancery, or the court of Exchequer, signified by an order made upon hearing all parties concerned, on the petition of such lessee or lessees; it shall and may be lawful to and for the guardian or guardians of such infant or person under age, upon such lessee or lessees tendering the fine or fines agreed on in such lease, and performing all such matters and things as by the said covenants and agreements ought to be performed on his or their part and behalf previous to such renewal, in such manner as shall by such order be directed, to renew such lease or leases, by adding such new life or lives, as shall be named by the said lessee or lessees, according to the said covenants and agreements; and such guardian or guardians are hereby required to renew such leases, by putting in such new life or lives as shall be so named unto them as aforesaid, while the infant or minor of such guardian or guardians shall be under such disability of infancy, or under age.—*s.* 1.

If of infancy, guardian shall, on order of Chancery or Exchequer, renew, lessee performing his covenants.

"And be it enacted, that in all cases where the person or persons, who by covenant or agreement are obliged to make such renewals, are or shall be disabled to renew by reason of being under coverture, beyond the seas, or *non compos mentis*, it shall and may be lawful to and for the Lord Chancellor, or Commissioner or Commissioners of the Great Seal of this kingdom for the time being, upon petition or complaint made to him or them in the high court of Chancery, upon payment of the fine, and such other sum or sums of money as ought to be paid upon such renewal, for the use of the person or persons entitled to the same, and upon the lessee or lessees doing and performing all and every such matters and things, as by the said covenants or agreements in the said lease or leases ought to be done or performed by him or them previous to such renewal, to order and appoint such renewal or renewals to be made by one of the Masters of the said court of Chancery, to be nominated and appointed by the said Lord Chancellor, or Commissioner or Commissioners of the Great Seal for the time being; and such Master so nominated and appointed, and also such guardian or guardians as aforesaid, shall make and execute such deed of renewal in the name of the person or persons who ought to have renewed the same; which deed or deeds of renewal so made and executed by the said guardian or guardians, master or masters, counterparts thereof being duly

If coverture, beyond sea, or *non compos*, renewal to be by a Master of Chancery.

To be in name of the person who ought to have renewed.

Counter-part by lessee.

enure to the benefit of the *cestui que* trust.

The only proof of the agreement was the admission in the answer of the defendant Leslie; and it stated that on on the death of the plaintiff's father, Leslie, not finding any person coming forward on behalf of the infant to lay out the money covenanted to be laid out, and to accept the lease pursuant to the agreement, and there appearing no probability that any person would come forward, (though he had offered, through the uncle, to execute the lease if any body would accept it on the part of the infant,) Leslie brought an ejectment on the title, which was served on all the family, under which he obtained judgment by default, and recovered the possession in 1778, (before the three years allowed for laying out the money had expired.) Immediately after the execution of the *habere*, in August, 1778, he executed a new lease to the uncle for three lives, at a rent which appeared clearly to have been the utmost value at the time. This lease was renewed in 1792. The uncle died, and the defendant, his widow, became possessed under his will of his interest in the lease, but without notice of the original agreement made with the plaintiff's father. The plaintiff attained his full age in 1796, and filed this bill in 1799.

Mr. Saurin and *Mr. Magrath* for the plaintiff: the *Attorney-General* and *Mr. Rice* for the defendant Griffin: *Mr. Pennefather* for the defendant Leslie.

The *Lord Chancellor* was of opinion that there was no foundation for the relief sought against Mr. Leslie. In executory agreements, an infant cannot take advantage of his infancy, to excuse the non-assertion of his right under it, where an immediate assertion of his right, and performance of his part of the contract is essential to the interest of the other party. It might be very different if Mr. Leslie had

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perfected by the lessee or lessees, for the use and benefit of the person or persons having the reversion and inheritance of such lands, tenements, or hereditaments, comprised in such deed or deeds, shall be as good and effectual in law and equity, to all intents and purposes, as if the person or persons under age had been of full age, and had executed the same, or as if the other person or persons under such disability had not been so disabled, and had executed the same.—*s.* 2.

"Provided such person or persons under age, or under such disability as aforesaid, were at the time of the renewal of such lease compellable in law or equity, to make such renewal."—*s.* 3.

used any improper means to get rid of the effect of the contract during the minority. Where there is an extraordinary contract such as this, an agreement to grant a lease on the one part, and a covenant to lay out money on the other, and the tenant dies, leaving an infant heir: if this contract is to continue executory during the whole minority, it will not be giving to the landlord the benefit of that in consideration of which he stipulated to grant the lease. It would be sanctioning delay on the part of the family of the infant, who in such case would probably always wait till he came of age, to the great inconvenience of the landlord in the mean time. When Mr. Leslie offered to execute the contract if any body would come forward on the part of the infant, his friends ought immediately to have acceded. Mr. Leslie is not to be bound after a lapse of twenty years to execute this contract at the election of the party, when there are no assets to make good the stipulation on the part of the original tenant: even if there were, those in possession of the assets ought to have come forward before.

But as to the uncle, Griffin, his Lordship held that the lease made by Leslie to him must be decreed a trust for the benefit of the plaintiff. The ground of decreeing renewals by trustees to enure to the benefit of the infant is public policy, *vide Bluett* v. *Millet*, 7 *Bro.* P. C. 120, to prevent persons in such situations from acting so as to take a benefit to themselves.—1 *Scho. and Lef.* 352.

The next case is:

Calvert v. *Gason.*

June 19, 1805.

Injunction in the nature of a writ of estrepement of waste, does not lie against a tenant holding under a lease containing a covenant for perpetual renewal.

The Attorney-General and Mr. Gabbett shewed cause against a conditional order which had been obtained for an injunction in the nature of a writ of estrepement, to restrain the defendant from raising limestone; on the ground that the defendant held the premises on which the alleged waste was committed, from the plaintiff, by virtue of a lease of lives, with a covenant for perpetual renewal.

On the part of the plaintiff it appeared, that one ground upon which the injunction was prayed was, that the defendant had quarried in violation of a reservation in the lease granted to him.

Lord Chancellor.—When I first sat in this court I was

disposed to think that injunctions ought to be granted in such cases as the present: but, upon inquiry, I found that interests under leases for lives, with covenants for perpetual renewals, had been constantly considered in this country as perpetuities. In the case of copyholds, in England, the freehold remains in the lord, and the copyhold tenant is considered as tenant at will, according to the custom of the manor, and therefore he has no right beyond that of a mere tenant at will, but such as the custom gives him. In the case of leases for lives renewable for ever, the whole inheritance is bound by the contract for renewal; and without special reservation, the lessor has no interest beyond the performance of the conditions of this tenure. Before the statute of Glous. 6. Ed. 1, a tenant for life was not punishable for waste, without special provision in his lease; and it seems to have been considered in this country that a lease for lives, with covenant for perpetual renewal, was not within that statute. If therefore the plaintiff is entitled to any remedy, he must seek it at law, except so far as the lease has specially provided for his protection: at least until a court of Law has determined on the right, it is not fit that a court of Equity should interfere by injunction.

These leases considered perpetuities by Lord Redesdale.

Allow the lease and set aside the order, save as far as it restrains defendant raising limestone or limestone gravel, to the prejudice of the reservation contained in the original lease of the premises. This order to be without prejudice to any proceeding at law plaintiff may think fit to take.—2 *Scho. and Lef.* 561.

Reg. lib. ord. lxxxvi, 295.

The next case is:

Evans v. *Walsh.*

Aug. 3, 1805.

This was a motion for an injunction on equity confessed, to restrain the defendant from proceeding on an ejectment.

A. holding under a corporation (of which he was a member,) and in the habit of obtaining renewals on favorable terms, demised to B. at a certain rent, with a covenant to renew at the

The defendant held the lands in question under a lease, made by a Corporation, in whom they were vested, in trust for a charity. The Corporation had been in the habit of renewing the lease granted by them to the defendant, who was one of their body, on favorable terms for several years; and the defendant underlet to the plaintiff, at a certain rent, with a covenant to renew to him at the same rent, as

often as the Corporation should renew to the defendant. The Corporation had discovered, that in the favour which they had shewn to the defendant, as one of their body, they had been guilty of a breach of trust, and came to a resolution not to renew by private contract with the defendant, but to advertise the lands to be let: and on a public auction, the defendant being the highest bidder, was declared the tenant, and obtained a new lease at a greatly increased rent. He refused to renew to the plaintiff at the old rent; and on the plaintiff refusing to advance his rent, the defendant brought an ejectment.

same rent as often as the corporation should renew to him. The corporation at length raised the rent payable by A. A. was bound, notwithstanding, to renew to B. on the former terms.

The defendant stated by his answer, that he entered into the covenant, in contemplation of obtaining a renewal on the same favourable terms which the Corporation had been in the habit of granting to their own members in all cases; and that otherwise he would not have entered into this covenant.

The Lord Chancellor granted the injunction, considering the defendant as bound to renew to the plaintiff on the old terms, unless he chose to abandon the property, and allow the plaintiff to stand in his place for the renewal which he had obtained; which, as he had not covenanted to renew with the Corporation, he might perhaps be at liberty to do. But if he thought fit to retain the benefit of the renewal which he had obtained, he was bound specifically to execute his covenant of renewal, on the terms upon which he had covenanted to renew.—2 *Scho. and Lef.* 519.

The next case is *Hamilton* v. *Denny*, *vide note*, *post*.

The next case is:

Keating v. *Sparrow.*

July 24, 1810.

On the 1st May, 1787, Simmons Sparrow, by indenture of lease demised to the plaintiff W. Keating, the lands of Derricknew, containing 100 acres, at the rent of £131 per ann. for three lives, with covenant for perpetual renewal, upon payment of a fine of £15, and all arrears of rent within six months after the fall of each life. Keating entered into possession, paid the rent regularly, and in 1788, upon his marriage, conveyed his interest in the lease to trustees to the use of himself for life, remainder in the usual course of family settlements. In 1790, Simmons Sparrow died, leaving the defendant, his only son and heir at law. In

Right of renewal gone, though but one life in the lease dropped, where tenant neglected to renew for three years after a demand made under the Tenantry act, 19 and 20 Geo. 3, c. 30.

1791, one of the *cestui que vies*, in the lease of 1787, died. On the 29th August, 1803, the defendant personally called on the plaintiff Keating to renew for the life that had fallen; and on the 6th April, 1804, by letter, which was delivered to the plaintiff, the defendant again called on the plaintiff to renew his lease; stating that if he did not within a month, that he would insist on a forfeiture; to this no answer was returned; and on the 17th February, 1807, the defendant filed a bill against the plaintiff, to perpetuate the testimony of the witnesses to the notice to renew, and to the delivery of the letter of April, 1804. On the 4th April, 1807, the plaintiff tendered the rent due on the 25th March preceding, the renewal and septennial fines, and all interest due thereon, for inserting a life, in the place of the *cestui que vie*, who had died, which were refused. And on the 1st September following, the bill in this cause was filed by the plaintiff Keating, and the trustees of his marriage settlement, praying a renewal for the life, nominated in the notice of the 4th April, 1807, on payment of all rent, fines, interest, and costs. This was resisted by the defendant, on the grounds of a forfeiture having been incurred by the plaintiff's neglect, in not offering to renew for near four years after being called on so to do.

Serjeant Ball, and *Mr. Lloyd*, for the plaintiff.—If there be no fraud on the part of the tenant, in not renewing, which it is impossible to infer in this case, from the smallness of the fine payable, it is a case in which relief ought to be given. The cases which have decided against the right to renewal, in consequence of the laches of the tenant, are those, where all the lives were dropped, where all the legal remedies of the landlord were extinguished, where the legal title of the tenant was at an end, and where, from that circumstance, it might well be inferring that he intended to abandon his lease, and all benefit of renewal. In *Magrath* v. *Muskerry*, *Vern. and Scriv.* 166. 1 *Ridg.* P. C. 496, Lord Lifford, in his judgment, referred to the case of *Ryan* v. *Lord Clonmore*, cited in *Vern. and Scriv.* 180, 1 *Ridg.* P. C. 492, relies much on the circumstance of some of the lives being in existence as favourable to the right of renewal, which, in the other case, from the fall of all the lives, was refused. Lord Redesdale also in *Jackson* v. *Saunders*, 1 *Scho. and Lef.* 443, lays much stress on that circumstance; and therefore, under the authorities of those cases, it may be fairly inferred that the provisions of the statute 19 and 20 Geo. 8. c. 30, which require payment of

the fine within a reasonable time after a demand made, only apply to cases where the lives are dropped.

The *Solicitor-General* and *Mr. E. Pennefather* for the defendant. The statute which had in view the giving relief to tenants, who had been guilty of laches, in not renewing their interests within the time specified in their leases, makes no distinction between the neglect of the tenant in not renewing after a demand made, where all the lives are fallen, or where but one ; the effect of it has been to impose the duty on the landlord, to call on the tenant by notice to renew, before he can insist on the forfeiture provided by the contract of the parties ; and therefore it is perfectly immaterial whether, in the construction of this statute, as applicable to the laches of the tenant, in not renewing after notice served, all the lives be gone, or but one. The simple question to be decided is, has the tenant come in within a reasonable time after being called on to renew? And can it be pretended that he has done so in this case, after a neglect for near four years from the service of the notice, and after a bill, to perpetuate the testimony of the demand made, and the notice served, had been filed? much less time was, in *Jackson* v. *Saunders*, 1 *Scho. and Lef.* 448, held to be a bar.

Landlord may file a bill to perpetuate the evidence of a demand under the Tenantry Act on his tenant to renew.

Lord Manners.—I have looked into the authorities to see if I could find any principle on which to adopt the distinction relied on by the plaintiff's counsel, between the cases where all the lives have dropped, or but one. In the last reported case of *Jackson* v. *Saunders*, this question was very much discussed, and there Lord Redesdale puts the case of the demand being made in 1791, when there was but one life in being ; a case which he states would put the landlord to considerable difficulty in preserving the evidence of a demand having been then made by him, and the great expense he would be put to in proceeding to bar the right of the tenant, by filing a bill to perpetuate the testimony of that fact. Here then you perceive, that in such a case he puts it, that a landlord calling on his tenant to renew, when one life had dropped, can preserve his evidence, in order to avail himself of the forfeiture given by the act of Parliament; and he puts the landlord's right upon a demand being satisfactorily proved by him, and that the tenant had refused or neglected, or had been guilty of wilful default. In observing upon the act, Lord Redesdale states, that the true principle deducible from it was, that it makes that which was before indefinite, definite.

After a demand

In *Magrath* v. *Muskerry*, *Vern. and Scriv.* 166. 1 *Ridg.*

made, and neglect to renew when all the lives are gone, it is dereliction; when but one or two, negligence; and wilful default when a refusal, or neglect to renew in a reasonable time.

To neglect renewing for three years after demand made, is wilful default.

Relief against forfeiture where compensation can be given, applies only to cases of contract, not to the provisions of a statute or conditions in law.

When penalty only designed to secure the money; then relief may be given against it.

P. C. 469, Lord Lifford argued on the grounds of a dereliction, and puts that case on the difference between wilful default, or negligence, and dereliction, and there is a material distinction; for when all the lives are gone, it is dereliction; when but one or two, negligence; wilful default is, where a demand has been made, and there is a refusal or neglect to renew in a reasonable time; what is it in this case? Here a demand was made three years ago, and neglect ever since; now, if I were not to call this wilful default, I would do away all the provisions of the act.

It has been argued on the part of the plaintiff that this court leans against forfeitures, if the party can be compensated; and that he can in this case, where interest and septennial fines may be given to the landlord. That principle is applicable to cases of contract between the parties, but not to the provisions of an act of Parliament, or conditions in law. In *Peachy* v. the *Duke of Somerset*, 1 *Stra.* 447. Lord Macclesfield makes this distinction: he says cases of agreement, and conditions of the party, and of the law, are certainly to be distinguished; you can never say the law has determined hardly, but you may, that the party has made a hard bargain. The true ground of relief against penalty is, when from the original intent of the case, the penalty is only designed to secure the money. Taking then the principle from Lord Macclesfield, it is manifest that in cases of mere contract between parties this court will relieve, when compensation can be given, but against the provisions of a statute no relief can be given. Apply that to cases arising under this act of Parliament. Here, before a demand made by the landlord upon the tenant to renew after the fall of a life, the tenant would be entitled to a renewal upon making compensation, whatever time may have elapsed, it being then but in contract; but after a demand by the landlord, the provisions of the statute apply, it then ceases to be merely a contract between the parties, and comes within the opinion of Lord Macclesfield, that relief cannot be given against the provisions of the law.

What are the facts of this case? The tenant allows three years to elapse after demand, before he comes for a renewal, and after he had been again apprized by the landlord, that he would avail himself of the provisions of the act; for the landlord took pains to preserve the evidence of having made a demand, which I think the act gives him a right to do, in order to avail himself of a forfeiture: I must therefore dismiss the bill, but as it is the first time a bill

has been filed for a renewal,* one life only having dropped, I consider it a new question, and I dismiss the bill without costs.—1 *Ball and Beat.* 367.

Observations on the Case of Keating v. *Sparrow.*

Observations on the case of *Keating* v. *Sparrow.*

Tenant's equity may be lost on the drop of a single life.

THIS case is chiefly remarkable for being the first case in which the bill of the tenant praying a renewal was dismissed where one life only had been dropped. It was contended by the counsel for the plaintiffs, that the tenant's equity could not be lost until all the lives were gone; but there does not seem to me any authority in the aforegoing cases by which this position could be sustained; and in the protest of the Lords against the enactment of the Tenantry Act, the signatures to which include a large portion of the chief landed interests in Ireland, *vide ante, p.* 95, it is made a specific ground of complaint in that document, that the statute makes no difference, whether the neglect be long or short; whether the fine be large or nominal, or whether all the lives be dropt, or one only. Such was manifestly the distinct and recorded understanding of the meaning of the statute at the time of its enactment, by an important por-

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* *Renewal of Church Leases of Lands and Tenements.*

Church Leases.

THE case of *Hamilton* v. *Denny,* is the case of a church lease; and all cases of this description shall be introduced as notes, because although they bear a sufficient analogy to the renewal of leases in perpetuity, which more properly forms the subject of this Treatise, and the law of the one must be relevant and illustrative of the law of the other; yet the cases in reference to those distinct classes will be the more intelligible by being thus distinguished; preparatory to the introduction of these decisions on church leases, some explanatory observations upon them may be necessary as to their general nature, and their characteristic distinctions from church leases in England.

The Church a system of corporations.

The Church Establishment is a great corporation, made up of many other corporations; some of which are corporations aggregate, as a college, or dean and chapter; and others are corporations sole, as an archbishop or bishop, a parson or vicar. This system of corporations had of course, like its members, perpetual succession; and the great object of the canon law, which was the law of the Church, and one object of the common law as a friend to the Church, was to sustain Church property from dimi-

tion of the legislature; and this circumstance affords a fair guide to the meaning of the statute on the acknowledged maxim, that *cotemporanea expositio est fortissima in lege.*

The statute has circumscribed the old indefinite indulgence of the Irish equity to the tenant, provided the landlord or his agent thinks proper to bring the statute into operation after the drop of any life, by making a formal demand of payment: but if no such demand be made, the indulgence to the tenant continues as before the statute until terminated by such demand. And when such demand be made, and made in a proveable manner, nothing but due diligence by the tenant in the payment can preserve his title to renewal from forfeiture. This case is a ruled decision, and a well sustained one, that the right of renewal may be forfeited on the drop of a single life; and *Jackson* v. *Saunders* is an authority, that where the statutable demand had been on the 6th October, a tender on the 20th March following may be too late, under circumstances of previous intimation for two years that the payment was expected. This case also establishes some important distinctions and definitions on this subject;

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nution, by preventing its members, either through negligence or design, from alienating or committing waste on the property of the Church, and compelling them to respect the rights of their successors, so that this property might suffer no diminution in its descent. In order to transmit through different ages the property of the Church, it was necessary to establish a perpetual succession, and hence, doubtless, sprung the principle, that the clergyman, if he held property of the Church, should be regarded by the law as a corporation; and secondly, to transmit that property unimpaired, was the great object of all the laws made against alienations, or committing any injury on the rights of the successor.

For the transmission of the church revenues.

From the last mentioned observations, the object of the law must be apparent in making the Church a corporation, and each of its chief component members a corporation. The object was to transmit to posterity, and sustain without diminution, the revenues of the Church for the support of the Church: and this object the law proposed to effectuate by two means: first, by making the parson or church beneficer, a corporation; it created a succession which gave a continual representative for the *transmission* of that portion of Church property to future times; and secondly, by the operation of disabling acts of Parliament; the ecclesiastical Corpora-

namely, dereliction, negligence, and wilful default, and the distinction between cases of mere contract, between the parties, and cases under the provisions of the statute; in the former case, equity would relieve, where it could make compensation; but in the latter case, it cannot relieve against the statute: or in other words, if the landlord continues his indulgence, by never demanding payment of the fine; and thus never bringing the statute into operation, for it is the demand which brings it into operation; the tenant in such case will still have his indefinite indulgence; and equity may still permit him to entitle himself to his right of renewal by making compensation to his landlord for his negligence, no matter how protracted that negligence may have been; and no matter whether all the lives be dropt, or otherwise. But if the landlord or his agent has once brought the statute into operation by making a demand under it, equity will not relieve against the statute; that is, will not continue the indulgence after such demand; but will hold the tenant to strictness by requiring him to shew that he used due diligence in tendering payment within reasonable time after such demand; although such demand should be made after the drop of the first life.

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tion so created, was compelled to protect against diminution or waste, the interest of his successors, and the patrimony of the Church. Thus to transmit unimpaired the revenues of the Church, was the united object of the common and the canon law; and the creation of ecclesiastical Corporations, and the enactment of their non-alienation statutes, were the two means by which the law endeavoured to effectuate this object.

Leases by corporations sole, require confirmation at common law, but by corporations aggregate, not.

With these objects the law considered that the fee-simple was lodged in all corporations aggregate, and also in archbishops and bishops, who are said to be seised in fee in right of their Churches, but rectors and vicars were rather regarded as tenants for life, the fee being in abeyance; or they represented the fee in respect to the Church, and were tenants for life in respect to their successors. In fact the common law regarded the third class with most restraint, because of the three they were most likely to require it. The first class, namely, corporations aggregate, was the least restrained, because it was considered that the property of the Church was most secure, where selfish objects were weakened by being dispersed among so many persons; therefore the common law allowed a corporation aggregate to make any leases out of its fee simple for lives or years without any control. But in respect to the

Alpine v. *Swift*. Difference between limited renewals and renewals in perpetuity.

Before closing the 1st volume of *Ball and Beatty*, the Editor takes this opportunity to remark that he has excluded the case of *M'Alpine* v. *Swift*, 1 *Ball and Beatty*, 285, on the principle, that although it was a case on a renewable lease; yet it was not on a lease *renewable for ever*: a distinction which the Editor conceives to be quite important. The cases on which he is treating, and to which the peculiar equity of Ireland as well as the Tenantry Act, apply exclusively, being all cases of covenants on leases for lives renewable for ever, that is perpetuities, or what may be perpetuities. But the case of *M'Alpine* v. *Swift*, was for a specific renewal of three lives and no more; and therefore never could be a perpetuity, nor come within the legal principles peculiarly applicable to perpetuities, which are construed liberally; whereas specific and limited renewals, such as *M'Alpine* v. *Swift*, are on the contrary construed strictly.

Nesbitt v. *Tredennick*. The principles on which courts of Equity act, in considering

The case of *Nesbitt* v. *Tredennick*, 1 *Ball and Beatty*, 46, is not farther referential to the subject of this treatise, than for the recognition of one principle applicable hereto, and for describing the nature of the legal term "Graft," in respect to renewal leases. "The principle to be extracted from all the authorities amounts to this, that when-

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other two classes, consisting, as has been observed, of corporations sole, these were restrained from making leases, unless such leases had been confirmed by the other persons who were guardians of the inheritance, or interested therein. Thus by the common law, leases made by sole corporations required what was called confirmation; but those made by aggregate corporations did not.

Confirmations by whom.

Leases made by archbishops and bishops are to be confirmed by the dean and chapter, or deans and chapters, if there be several chapters: those made by deans are to be confirmed by the bishop and chapter; those made by prebendaries and archdeacons, by the bishop, dean and chapter; those made by parsons and vicars, by their patrons and ordinaries; and those made by the incumbent of a donative, by the patron alone.—*Degge*, *C.* 10, 120.

Necessity of confirmations deemed a restraint on agriculture.

In the 32 of Henry 8, when the lands of the Church were so extensive in England, this requisite of a confirmation in respect to leases by corporations sole, was considered to operate as a restraint upon agriculture; and as the necessity of such confirmations in all such cases, and the failure of them in many, occasioned insecurity to farmers, and impediments to tillage, the 32 Hen. 8, c. 28, was enacted in England, commonly called the enabling statute.

ever a mortgagee, executor, trustee, or tenant for life, gets an advantage, by either being in possession, or behind the back of the party, mortgagor, *cestui que trust*, or remainder-man, he shall not retain the same for his own benefit, but hold it in trust; the new lease in any of these cases will be considered as a graft upon the old one." And again: "In all cases upon this subject, either the party, by being in possession obtained the renewal; or it was done behind the back, or by some contrivance in fraud of those who were interested in the old lease; and there was either a remnant of the old lease, or a tenant-right of renewal on which the new lease could be engrafted."—*Judgment by Lord Manners*, 47.

renewed interest obtained by mortgagees, trustees, &c. *Grafts* are, that the advantage was procured either by being in possession; or when out of it, by a contrivance to oust the lessee of the benefit of renewal.

The next case is:

Jessop v. *King*.

1811, December 12. 1812, February 17.

BALDWIN CROWE being seised in fee of the lands of Kinchor, and other denominations, containing 400 acres, by indenture of lease, bearing date the 20th May, 1738, demised same, together with the timber then standing on said lands, and to be thereafter planted thereon, to Tho-

After a notice by landlord, on the 16th Dec. to renew; where the tenant had

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The enabling statute empowered all persons seised of an estate in *fee simple* in right of their churches to make leases binding their successors as well as themselves, for *three* lives or twenty-one years, without the concurrence of any other person, always provided that they be by indenture from the making or day of the making, the old lease being first surrendered, or within a year of expiring; of corporeal hereditaments; of lands and tenements most commonly letten for twenty years past, on which the most usual and customary rent for twenty years past and reserved; and such leases not to be made without impeachment of waste.

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Thence the enabling statute in England.

The enabling statute did not extend to the third class of ecclesiastical corporations, namely, rectors, or vicars; doubtless because their income was chiefly tithe; and the rule of guarding the interest of the successor by the confirmation of other parties was the more necessary; nor did it extend to the first class, namely, corporations aggregate; because in that case the common law dispensed with the necessity of any confirmation; and this statute therefore merely extended the power of the second class, that is, of those church dignities, and sole corporations who were seised in fee simple in right of their churches; such as archbishops, bishops, &c.; and as their property was chiefly glebe, that is

not his lease, was but just of age and embarrassed; where an erroneous account was furnished by the landlord's agent after an application by the tenant in Jan.; where a draft of renewal in Feb. following was tendered; and the landlord prevented the tenant from selling timber to pay the rent and fines.
A tender in the Oct. following was, under those circumstances, held to be in time, under the provisions of the Tenantry Act;

mas Jessop, the great grandfather of the plaintiff, for his own life, and for the lives of William Jessop and George Jessop, the sons of the lessee, at the rent of 7s. 6d. per acre. In which lease was also contained the following covenant for perpetual renewal. "That the said Baldwin Crowe, his heirs and assigns, should and would, on the death of each and every of the said persons, for whose lives said lease was made, and upon the said Thomas Jessop, his heirs and assigns, paying all rent and arrears of rent that should be then due, and upon payment of five shillings as a fine, for the renewal of each life to be added and renewed, renew the said lease, by adding and inserting the life or lives of such other persons, as the said Thomas Jessop, his heirs or assigns, should nominate and appoint in the room of the person or persons so dying, and also upon the death of any of the life or lives thereafter to be added, that he would renew or add the life or lives of any other person or persons, the said Thomas Jessop, his heirs or assigns, should nominate and appoint; so as the said Thomas Jessop, his heirs and assigns, should have, hold, and enjoy, the said premises for ever, in a lease of three lives renewable for ever under the rents, covenants, and reservations, in said lease mentioned."

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land, it enabled them to make leases to a certain extent, and under certain conditions, without the concurrence of any other persons concerned, or what is technically called, "without confirmation."

The enabling statute in England in favour of agriculture overshot its mark, and among other causes, produced the disabling statutes, in favour of the Church, enacted in the reign of Elizabeth.

The enabling statute (32 Hen. 8. c. 28,) made entirely for the benefit of the farmer, left the Church open to many of the old inconveniences, losses, dilapidations, and consequent decay of divine service, to which it had been subject, particularly as it left the leases and grants made by archbishops and bishops, if confirmed by the dean and chapter, however long and unreasonable, good as they were before by the common law. The *disabling* statute therefore was passed, *made entirely for the benefit of the successor*, which enacts, that all grants of archbishops and bishops, even though confirmed by the dean and chapter, other than for the term of twenty-one years, or three lives from the making, or without reserving the usual rent, shall be void.—*Browne, Eccl. Law*, 191.

Disabling statute.

The student of law will here observe, that the enabling statute

Thomas Jessop entered into possession under this lease, and by his will, dated in 1762, he devised his interest in these lands to George Jessop, the grandfather of the plaintiff. On the 14th May, 1785, upon the intermarriage of William Jessop, the eldest son of George Jessop, these lands were, by indenture of that date, conveyed to trustees, to the use of William Jessop for life, remainder to trustees for a term of 500 years, in trust, to secure a jointure for his intended wife, and to raise portions for younger children. Remainder subject to the said term to the first and other sons of the marriage in tail male.

and a renewal decreed on the payment of costs.

G. Jessop died many years ago, and in 1799, William Jessop died, leaving the plaintiff then a minor under the age of fourteen, his eldest son, and entitled to an estate in *quasi* tail male, under the settlement of 1785.

In 1805, the defendant King purchased the reversion in fee, in said lands, subject to the said lease to Thomas Jessop, from Mr. Henry, the assignee of B. Crowe.

The lives in the original lease being long since gone, the last having fallen in 1787, and there not having been any renewal thereof executed; the defendant King, on the 16th December, 1809, caused the following notice to be served upon the plaintiff. " Sir—I require you to take

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dispensed with confirmation: and that the disabling statute contracted the power of lease-making, even where there was such confirmation; and he should further observe, that in Ireland this power of making church leases is still more contracted than it is in England.

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The common law still remained unaltered in Ireland, and the Church in that kingdom, subject to all the waste and alienation arising from the original, unlimited or ill restrained power of selling and leasing, vested in the ecclesiastical corporations.—*Browne's Eccl. Law*, 191.

The canons of 1634 in that kingdom interposed, and by the sixteenth canon it is ordained, that no archbishop, bishop, dean and chapter, or dignitary shall in anywise diminish the ancient revenues of their sees or churches, nor alienate their *lands in fee farm*, nor destroy their woods, nor demise their mensal lands, unless it be to their resident curates during their own incumbency, nor join in improper confirmations.—*ib.*

Ir. canon as to alienation.

This canon was followed up about a year after by the Irish statute 10 and 11 Car. 1. c. 3, which is intended to include both the *enabling* and *disabling* statutes of England; and from the clauses 1 and 2 of which, amended by the 1 Geo. 2. c. 15. s. 12,

Ir. statute enabling and disabling.

out a renewal of the lease, which you hold under me, of the lands of Kinchor in the King's County, and to pay up all rent, and renewal fines, otherwise I shall decline to execute any renewal. John King."

The plaintiff by his bill, which was filed on the 29th of October, 1810, prayed a renewal of this lease for three lives, naming them pursuant to covenant, offering to pay all rent in arrear, renewal and septennial fine, and interest thereon. The defendant by his answer insisted, that the plaintiff had, by his laches in not complying with the notice to renew in a reasonable time after demand made, forfeited all benefit of renewal under the Tenantry Act.

It appeared from evidence given in the cause, that about the latter end of December, 1809, or beginning of January, 1810, the defendant was applied to by Molony, the plaintiff's agent, to see the counter-part of the lease, for the purpose of enabling him to prepare a renewal; that the defendant referred him to Armstrong, his attorney, in Dublin, but refused to give Molony a letter for that purpose, stating, that he would be there himself in a few days. Molony, after waiting some time for the arrival of the defendant, called upon Armstrong, told him of the conversation, and requested him to shew the lease, or give a de-

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13, 15; and further amended by the 35 Geo. 3. c. 23. s. 1, 2, 3, 4; all church leases of lands and tenements in Ireland may be considered as derived; and the amount of these enactments may be thus summed up; that with the exception of incumbents of parishes in cities or towns corporate, who are enabled to make leases not exceeding twenty-one years; all other church lands or tenements in Ireland are limited to twenty-one years.

Differences as to church leases in England and Ireland.

It must have been observed, that the Irish law on this head differed from the English in three material respects, viz. that in Ireland the lease can *only* be *for twenty-one years*, and not for *three lives*: the second, that a *moiety of the true value* at the time of the making was to be reserved; the third, that the lands need not be *accustomably letten*. The first and third remain unaltered, the second has been altered by the 35 Geo. 3, in manner following. This last enacts, that the rent reserved need not be a moiety of the true value, so it be not less than was reserved for twenty years before. And leases heretofore made (in other respects legal) are thereby confirmed, though half value be not reserved, if in like manner the rent be not less than it was for twenty years, and although more than one year of the former lease were unexpired at the making; and what was formerly held

scription of the premises, that a renewal might be prepared. This was refused by Armstrong. On the 16th January, 1810, a draft of a renewal was laid before Armstrong by the directions of the defendant, and an account was demanded of the rent and renewal fines then due. Armstrong never returned this draft of the renewal, but in the latter end of February, or beginning of March, he furnished Molony with another draft, which Molony immediately altered and returned; but which, by the mistake of Armstrong, in sending it to the house of another Mr. Molony in the same street where Molony, the plaintiff's agent, resided, was not received till the latter end of May. It also appeared that at the same time Armstrong sent a draft of a renewal, he also furnished Molony with an account of the rent in arrear, and renewal fines. By this account, he demanded rent for other premises not contained in the lease, of which the renewal was sought, and for an arrear of rent due before the defendant had purchased from Mr. Henry, and which had been incurred while the plaintiff was a minor, by the default of his guardian; there was also a blank left in this account for the amount of that arrear; Armstrong declared he would not receive the rent of Kinchor, without the other rent stated in the account. Mo-

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under one lease, if afterwards let under several leases good, if the sum of the rents be not less than before; but not to authorize concurrent leases otherwise than as before this act.—*Bro. Eccl. Law*, 200. Church Leases.

The previous part of this note being thus premised, as explanatory of the general nature of these church leases of lands and tenements in Ireland; and their peculiar characteristics, as distinguishable from the law of England in like cases; the Editor shall next introduce the first reported case in Equity, which occurs on the subject of the renewal of these church leases.

Hamilton v. *Denny*.

July 5, 1809.

A fine paid for the renewal of a lease by one of two tenants, jointly holding;

In 1799, the Bishop of Clogher executed a lease to the plaintiff Hamilton and Anthony Denny, of part of the see lands for a term of twenty-one years, at a rent of £70 per annum. It recited a former lease from the then Bishop of Clogher to Anthony Godfrey; and that same had become vested in the plaintiff

lony, by his deposition, stated that he frequently applied to Armstrong to fill up this blank and to furnish a correct account of the rent and fines due out of the lands; that Armstrong from time to time promised so to do, but never did. Armstrong by his deposition denied any application being made to him for that purpose, or refused on his part to go into the account. It appeared that in September, 1809, the plaintiff advertised the timber on these lands for sale, but from some reports circulated in the neighbourhood, no sale could be had; and in the month of May, 1810, he again advertised a sale to be had by auction on the 5th July following, for the purpose of raising money to pay the rent and renewal fines.

On the 3d July, the defendant filed a bill for an injunction to stay waste, and to restrain the plaintiff from cutting down the timber. On the same day he obtained a conditional order at the Rolls, which was served on the 5th, on which day cautionary notices against purchasing the timber were posted up by the defendant's order, and accordingly the sale was not proceded in. The plaintiff, having in the mean time procured the original lease from the solicitor to his guardian, came in to shew cause against the conditional order, which was allowed with costs, and

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and A. Denny. It appeared that Hamilton and Denny entered into possession; that on the 17th Nov. 1799, a settlement on the part of Denny was executed, whereby he conveyed his interest in a moiety to trustees, to the use of himself for life, with remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail male, in the usual course of family settlement. Immediately after this, the lease was renewed; Hamilton paying the entire of the renewal fine. On the 25th November, 1800, the original bill in this case was filed by the plaintiff Hamilton against A. Denny, and the trustees of his settlement, to be repaid his share of the fine out of Denny's moiety, and for a partition. Denny died soon after; the plaintiff again renewed the lease, and amended his bill in September, 1804, putting that fact in issue, and seeking a moiety of that fine against the persons deriving under the settlement made by Denny; and praying that same might be deemed a charge upon the land, and for a sale.

a lien on the other moiety, though under settlement.

The *Attorney-General*, *Mr. R. Johnstone*, and *Mr. Haire*, for the plaintiff. If a mortgagee of a leasehold interest advance money for renewal fines, it is quite of course to allow the amount as against the mortgagor, seeking a redemption of the interest; or

upon that occasion, the plaintiff offered to go before the Master forthwith, and settle the account on the foot of the rent and renewal fines; which the defendant refused, alleging, that the plaintiff had no interest, and had forfeited his lease; and upon an appeal the order of the Master of the Rolls was affirmed. In September, 1810, the sale of the timber took place; the defendant was told the money was ready for him on the 15th of that month, if he would accept it, which he declined, and on the 16th October, the sum of £800 in Bank of Ireland notes, and two engrossed deeds of renewal were tendered to the defendant for execution, and by him refused. It also appeared, that the plaintiff on coming of age was greatly embarrassed, his guardian having applied to his own use the rents of the plaintiff's estates, and having suffered a great arrear of rent to accrue due during the minority. Of these facts the defendant was apprised, and had lent the plaintiff on his coming of age in 1807, a sum of money to relieve his necessities. There was always a sufficient distress upon the premises for the rent due to the defendant.

The *Solicitor-General*, *Serjeant Ball*, *Mr. Burton*, *Mr. Berwick*, and *Mr. Lefroy* for the plaintiff.

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in a bill to foreclose by the mortgagee, he is always decreed entitled to the amount of the mortgage and renewal fines; then does not this case clearly amount to that? For if Hamilton had taken the lease in his own name, though it would be considered as a graft upon the old lease, yet this court would never decree it to be so, except on the terms of the party who claimed the renewed interest, paying his share of the renewal fines: then shall the conduct of a man acting honestly, and trusting to the security of the lands, put him in a worse situation, than if he had acted so as to drive the present defendant into a court of Equity.

Mr. Plunket, *Mr. Smyly*, and *Mr. Deering* for the defendants. The renewal fines paid on bishop's leases, are in the nature of annual rents; the renewals are executed every year. Hamilton had full notice of the settlement, and the payment of the fine is no more than an advance of the rent, to save an eviction, or loss of interest, which creates no *lien*; it is only in ease of the tenant for life; it is a personal demand, and his assets alone are liable.

The *Lord Chancellor*. The object of the bill in this case, is to have the moieties of renewal fines paid by the plaintiff, as joint-tenant of lands held under the see of Clogher, declared charges upon the other moiety thereof. It appears that renewal fines

If there be not any fraud on the part of the plaintiff, if there be no wilful default, no laches amounting to such, he is entitled to the relief he prays by his bill. What are the circumstances of this case; a demand is made in December, the tenant not having his part of the lease, applies to the landlord to see his, for the purpose of preparing a renewal. He is refused it, and his agent prepares a draft from a memorandum he found, which he immediately sends, and demands an account of rents and fines. He is furnished with an incorrect and improper one, as containing a demand not warranted; the defendant declines going into the account, and when the plaintiff had proceeded to sell the timber, for the purpose of raising money to discharge the arrear of rent and fines, he is restrained by the defendant, who well knew it to be the only fund the plaintiff had to satisfy that demand. Surely, all the delay that has occurred has been fully accounted for; the anxiety evinced by the plaintiff disproves any charge of fraud, any abandonment on his part, and no case has ever gone so far as to say, that laches of this kind should create a forfeiture. Look to the amount of the renewal fine, but five shillings. Surely, that very circumstance alone negatives any intention of fraud, or laches, on the part of the plain-

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were paid by the plaintiff, both before and since the execution of the settlement entered into by A. Denny, under which the defendants, who now resist the demand, claim title to that moiety.

Mortgagee of a leasehold interest paying renewal fines, reimbursed out of the estate.

Had the fines in this case been advanced by a mortgagee of this leasehold interest, it is well established, that he would be entitled to recover the amount out of the estate; *vide Manlove* v. *Ball*, 2 *Vern.* 84, *Lacon* v. *Mertins*, 3 *Atk.* 4; then does the character in which the plaintiff stands as joint-tenant, alter the case. Has he not advanced the money on the credit of the estate, and for the benefit of it? And though there is a settlement in this case, yet if the trustees in that settlement had paid the fines, they would have been entitled to re-payment out of the estate; and shall not a joint-tenant, who renews for the benefit of his co-joint-tenant, and those deriving under him, be entitled to the same measure of justice? If he had taken the renewal in his own name, he would, as to a moiety, have been clothed with a trust for those deriving under the settlement, but subject to the fines of renewal. I am therefore clearly of opinion, that as the renewal enured to the uses of that settlement, that as the parties deriving under it reaped the full benefit, Denny's moiety is answerable to the plaintiff for the amount of his advances on account

tiff. In *Jackson* v. *Saunders*, 1 *Scho. and Lef.* 443, this doctrine was much discussed; Lord Redesdale there relied more on the antecedent delay, than on the laches after the notice. Here, there has been none, the plaintiff was a minor, much embarrassed by the conduct of his guardian. The landlord having sufficient remedies to recover his rent by distress, or by ejectment for non-payment of rent, according to *Hare* v. *Lloyd*, *Vern. and Scriv.* 127, 1 *Ridg.* P. C. 341, has no right to insist on a forfeiture under the Tenantry Act, which merely applies to renewal fines, and was enacted to enable landlords the more easily to recover the same. In this case also there was a mistake in the account furnished by the defendant's agent, a circumstance relied on by Lord Clare, in *Freeman* v. *Lord Waterford.* 1 *Scho. and Lef.* 451, *n.* It is also material to observe, that no time is pointed out by the lease for the renewal to be made. The plaintiff therefore, under all those circumstances, under the local equity of the country, restored by the Tenantry Act, is entitled to the relief he prays, and without costs.

The *Attorney-General*, *Mr. Plunket*, *Mr. Parsons*, *Mr. Lloyd*, *Mr. Wallace*, and *Mr. G. Moore*, *Jun.* for the defendant.

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of those fines; and that this case falls within the principle upon which mortgagees, who renew leasehold interests, have been decreed entitled to charge the amount upon the lands.

A partition was accordingly decreed, the costs of it to be borne by both parties; and an account was directed on foot of the fines paid by the plaintiff; that a moiety of them was a charge upon the defendant's moiety of the lands, together with the costs, so far as regarded this part of the suit.—1 *Ball and Beat.* 199.

Revel v. *Hussey.*

1, 3, 4 March, 1813.

Renewal decreed against a tenant under a bishop's lease, without any contribution from his sub-lessee; he

The bill prayed, that the defendant James Hussey might be decreed to execute a renewal of the lease granted by him to Thomas Hussey, the other defendant, pursuant to a covenant for that purpose contained in the lease; and that the defendant Thomas Hussey might then execute a renewal of the plaintiff's lease, who offered to pay all the expenses. In 1793, the archbishop of Dublin granted a lease of 497 acres of the see lands, for twenty-

The covenant for renewal is upon condition of the tenant paying all rent in arrear, and renewal fines; the notice therefore follows the terms of that contract. A bill for a renewal on payment of fines only, without rent, could not be sustained, and in this case, the circumstance of the fines being so small, rather operates against the plaintiff, as imposing no difficulty on him to raise the amount. The last life dropped in 1787, the legal remedies provided by the lease for the recovery of the rent were gone, the tenant only held from year to year. Suppose then the rent to be the only subsistence of the landlord, what hardships would be imposed upon him to be deprived of his legal remedies? This is not near so strong a case against the plaintiff as that of *Jackson* v. *Saunders*, where the renewal was refused; for here in January, when Molony furnished the draft, Armstrong demanded the rent and fines, which were not paid, or tendered till the October following. No reason is given for not complying with that demand, but the alleged error in the account furnished. Under all these circumstances, the plaintiff has, by his laches, forfeited all benefit of renewal. To give him relief would go to establish a precedent of an alarming nature, by deciding that tenants could resist the claim for rent, and put

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one years, at a yearly rent to the defendant James Hussey; who soon after demised 70 acres of the same lands to the defendant Thomas, for a term of years, reserving an annual rent; he covenanted that he, James Hussey, would from time to time use his best endeavours to obtain a renewal from the archbishop, and that so often as he should obtain a renewal of his lease, that he would execute a renewal to Thomas, without fine or consideration. On the 17th Nov. 1798, Thomas Hussey executed a lease of 29 acres of those lands to Henry Pentland, for sixteen years, at £37 rent: the lease contained the following covenant: "That the said Thomas Hussey, his heirs, &c. shall (as often as the lord archbishop of Dublin, shall renew for James Hussey, esquire, his heirs, &c.) renew for him the said Henry Pentland, his executors, &c. without fine or any other expense whatever, except that of the leases." In 1803, Henry Pentland, in consideration of £1200, assigned his interest in this lease to the plaintiff. In March, 1809, the Archbishop of Dublin granted a renewal of James Hussey's lease, for which James Hussey was obliged to pay a fine of £3000, instead of £90, the fine formerly paid on each renewal: James Hussey then applied to the several persons holding these lands under him; to contribute rateably to reimburse him; with this application the plaintiff

having covenanted, that as often as the bishop should renew, he would renew without fines with his sub-lessee.

The tenant and his lessor are necessary parties; the sub-lessee deriving his title from their covenants.

off their landlords from asserting with effect their just rights.

February 17.—The *Lord Chancellor.* I have deferred delivering my opinion on the facts of this case, from a doubt I have entertained, whether the provisions of the Tenantry Act, 19 and 20 Geo. 3. c. 30, working a forfeiture of the tenant's right of renewal, extended to a demand, made by the landlord, of an arrear, including rent as well as fines, or to a demand of fines only, and a neglect by the tenant to pay the same within a reasonable time after such demand. And as I thought it of importance that the decisions of this court, and of the court of Exchequer, should be consistent with each other, and conceiving, that the judges of that court were more competent to decide on the construction of an Irish act of Parliament than myself, I have been desirous of communicating my doubts to some of the Barons. I have done so, and I have received doubts only in return.

The impression on their minds however appeared to be, that the landlord is entitled to demand payment of the arrears of rent, as well as of the fines, and to insist upon the forfeiture of the covenant of renewal, if not paid in a reasonable time; but when they stated the impression they

Whether a forfeiture in not paying rent, as

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would not comply; the defendants thereupon refused to grant him a renewal of the lease. It appears that in several of the leases granted by James Hussey of the see lands, there were covenants of renewal similar to that contained in the lease to Thomas Hussey, and in others there were covenants, that on the tenant paying a fine certain, he, James Hussey, would grant him a renewal.

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The *Attorney-General, Mr. Burne, Mr. Burton,* and *Mr. B. Campbell,* for the plaintiff.

In *Evans* v. *Walshe,* 2 *Scho. and Lef.* 519, the covenant for renewal was similar to the present; Lord Redesdale considered, that the defendant there was bound to renew with the plaintiff on the old terms, unless he chose to abandon the property, and allow the plaintiff to stand in his place; now on behalf of the plaintiff in this cause, we offer, that if the defendants do not choose to grant a renewal, that the plaintiff will stand in their place.

Serjeant Ball, Mr. Radcliffe, and *Mr. Farrell,* for the defendant.

It was the uniform practice of the see of Dublin, when the lease to James Hussey was executed, to grant renewals at £90

well as fines, in a reasonable time after a demand made under the Tenantry Act, will accrue? *Quere.*

had, they declined giving a positive opinion, without hearing the question argued. My doubts therefore still remain as to the application of this act, to enforce payment of rent; its express object being to compel payment of renewal fines, and there being no mention of rent to be found in any part of the statute. If there be a lease for lives, with a covenant for perpetual renewal, at a reserved rent, and no fine of renewal, upon an arrear of rent being incurred, the landlord can only obtain the land by proceeding under the ejectment statutes, he must obtain judgment, and have his writ of *Habere* executed: and if payment is not made, or the money brought into court, and a bill filed for a redemption, within six months after the *Habere* is executed, the tenant is barred of all relief in law or equity; but if it should happen that a fine of six-pence is reserved in such a lease, then it is contended, that he may proceed in this summary way, under this act of Parliament, by making a demand of payment of the rent and fines, and if not paid within a reasonable time, the tenant's interest is gone.

By the ejectment statutes, the rights of minors, femes

By the ejectment statutes, the rights of *feme coverts*, minors, and persons beyond seas, are saved; in this statute there is no such saving. I forbear to go further into the argument, but I cannot reconcile to myself that acts

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fine for the lands then held by him: calculating on this being permanent, James Hussey made under-leases, reserving a profit rent of nearly £300 per ann.; on the present archbishop being appointed, he entirely changed the practice, and demanded so enormous a fine, that unless James Hussey shall be reimbursed, what he has paid, by his under-tenants, he will not only lose his profit rent, but will be besides considerably out of pocket. Most of the tenants have agreed to contribute, but the plaintiff obstinately refuses. The question is, will this court, in a case so circumstanced, compel a specific execution of this covenant. In *Davis* v. *Hone*, 2 *Scho. and Lef.* 341—8, it is stated by Lord Redesdale, that if the tenants had recovered large damages in an action at law on the covenant, the landlord might have filed a bill for relief against the covenant, as having by circumstances become a covenant, which to enforce strictly would be against conscience, the landlord by the bill offering to perform the covenant according to conscience. In this case the tenant seeks to enforce an unconscientious covenant; Lord Redesdale thought that specifically to perform a covenant in such a case, would be both unjust and harsh; but he conceived that the court ought to modify it according to justice. If James Hussey should not renew with Thomas Hussey, the plaintiff could have no benefit of his covenant: no

of Parliament, so dissimilar in their provisions, indeed so inconsistent, can relate to the same subject matter. If therefore it were necessary to the decision of this cause, that I should determine the point, I certainly would call to my assistance one of the Barons of the Exchequer, and have the question re-argued; but as I can arrive at the same conclusion in this instance, whatever be the right construction of the act, I will not delay the parties to this suit, but leave the point to be determined, when the case arises that calls for the decision. Admitting then for the sake of the argument, that the landlord, by making a demand of rent, as well as of fines, has a right to insist on a forfeiture in the event of a non-compliance therewith in a reasonable time, let us see what are the facts of this case? In 1735, the original lease was granted, of which a renewal is now sought. In 1785, it became a subject of settlement, on the marriage of the plaintiff's father, who limited it to himself for life, remainder to his first and other sons in tail; and the plaintiff under that limitation is *quasi* tenant in tail. In 1799, his father died, and in 1807, the plaintiff attained the age of twenty-one. In 1805 the defendant King bought the reversion, and on the 15th December, 1809, served the following notice on

coverts, and persons abroad are saved. In the Tenantry Act there is no such saving.

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damages could at law be now recovered for a breach of the covenant; not against Thomas, for he has no estate out of which he could grant a renewal; nor against James Hussey, for there exists no privity of contract between him and the plaintiff, who is the under-lessee of his tenant; this is the first instance of the lessor being made a party to a bill by an under-tenant for a renewal, except in the case of collusion; we therefore humbly contend, that as no compensation could be recovered at law on this covenant, the court cannot decree a specific execution of it.

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In *Faine* v. *Browne*, cited in *Ramsden* v. *Hylton*, 2 *Ves.* 304, a man having agreed to sell an estate, given to him on condition, that if he sold it within twenty-five years, half the money should go to his brother, he afterwards refused to carry it into execution, alleging that he had been intoxicated at the time: on a bill to compel him to execute the agreement, Lord Hardwicke said, that without the other circumstance, that hardship alone of losing half the purchase money, if carried into execution, was sufficient to determine the discretion of the court not to interfere, but to leave them to law. In *Stent* v. *Baylis*, 2 *P. Wms*, 217, the Master of the Rolls says: "If I should buy an house, and before such time as by the articles I am to pay for the same, the house be burned

the plaintiff to renew. (His lordship here stated the notice.) Soon after this, a negotiation commenced between Molony and Armstrong, the attorneys for the plaintiff and defendant, and some time was lost in looking for the original lease, which appears to have been mislaid; and in the latter end of February, or beginning of March, an account was furnished by Armstrong, containing other demands besides the rent and fines of these lands. It is possible that if the tenant came here for a specific performance of this covenant for renewal, the court, in granting that relief, would make it part of the terms, that he should pay all rent and fines in arrear, due from him to the defendant, in respect of other lands, besides those compromised in the lease; but I by no means agree, that the defendant could insist on the non-compliance with this demand as a forfeiture under the act. Here then, as in the case of *Freeman* v. *Lord Waterford*, the defendant was under a mistake. There is some altercation between the attorneys, and some delay between the parties; but in the month of July the timber on this farm, then fully sufficient to answer all the demands on the foot of the rent, and fines, and which appears to me to have been the fund, well known to both parties, to be applicable to this demand, is advertised to be

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down by the casualty of fire, I shall not in equity be bound to pay for the house."

Evans v. *Walshe* was decided on a motion for an injunction; the court is ever unwilling to change the possession, until the cause comes on to be heard. From the circumstances of this case, the court ought to refuse to grant relief, it being entirely within its discretion. In *Harnett* v. *Yielding*, 2 *Scho. and Lef.* 549, Lord Redesdale lays it down, as one of the grounds on which equity refuses specifically to enforce the execution of an agreement, when it is doubtful, whether the party meant to contract to the extent that he is sought to be charged. In the following cases, equity refused to enforce the specific execution of agreements, merely because they were considered as hard bargains; *Tilly* v. *Peers* cited in *Mortlock* v. *Buller*, 10 *Ves.* 301; *Mason* v. *Armitage*, 13 *Ves.* 37; *City of London* v. *Nash*, 1 *Ves.* 12; *Buxton* v. *Lyster*, 3 *Atk.* 386; the *Marquess Normanby* v. *Lord Berkley*, 5 *Vin.* 539.

4th March. The *Lord Chancellor*. The plaintiff is sub-lessee of a piece of land, containing about twenty-nine acres, under a lease from Thomas Hussey, for a term of years at a rent of £37 per ann.; with a covenant from Thomas Hussey, that he would

sold. The defendant, King, then filed a bill in this court, to restrain the plaintiff from proceeding to cut down the timber, founding his title upon the forfeiture having accrued, and obtained a conditional order for an injunction, which was afterwards dissolved at the Rolls, on Jessop coming to shew cause against it. This proceeding by King evidently shows, that he relied on the forfeiture being complete; however the court, by its decision on that motion, did not so consider it: but that I do not rely on it further, than as it shows, that the delay is in some measure attributable to the defendant himself, at least the delay from July to September. The sale was also thereby prejudiced, for by the defendant's conduct he stopped it, and prevented any one from bidding at it. If he had remained quiet, and had not interfered, he would have been then paid. In September the defendant was apprised the money was ready, and in October a regular tender was made. There is another circumstance which must in this case be taken into consideration; that the plaintiff, on attaining his age in 1807, found himself in great difficulty, his affairs much embarrassed by the misconduct of his guardian, against whom he was obliged to file a bill, and that part of the arrear of rent, claimed by the defendant, had accrued due

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renew the lease without any fine, so often as James Hussey, the immediate tenant of the see, should renew with the archbishop of Dublin. James had previously granted a lease of seventy acres, (of which the said twenty-nine acres were part) to Thomas, at a rent certain, with a similar covenant of renewal, without fine. In 1798, Thomas leased these twenty-nine acres, part of the seventy acres, to Pentland, who in 1803, resigned his interest to the plaintiff in consideration of £1200, and the plaintiff under this title has filed this bill against Thomas and James Hussey, to have a renewal according to the covenant. The plaintiff's title is derived from the covenant in James's lease to Thomas, as well as under the covenant in a lease from Thomas to Pentland; and he has properly brought both the defendants before the court; the contract between James and Thomas enabling the latter to grant this lease with the covenant of renewal; both being necessary to his title. *Prima facie* this is a clear case for the interposition of this court, by granting specific relief.

But on behalf of the defendants, it is contended, that the situation of the parties has been materially altered since the entering into this contract; that although it was advantageous to James at the time to grant this lease to Thomas Hussey at a rent certain,

during the plaintiff's minority. This must have been known to King, as he had, about that time, lent the plaintiff a sum of money to relieve him from his embarrassments, and also, as I before observed, that the defendant knew that the timber was the only funds the plaintiff had to discharge the rent and fines.

When no fraud or neglect to renew in a reasonable time after a demand, relief against lapse of time is given under the Tenantry Act, upon compensation being made.

Then what is the law of this court, resulting from these facts under the provisions of the act? I say, what is the law of this court, because the act declares, "That courts of Equity, upon an adequate compensation being made, shall relieve such tenants and their assigns against such lapse of time, if no circumstance of fraud be proved; unless it shall appear, that after a demand made, the tenant refused or neglected to renew within a reasonable time after such demand." Now, it is perfectly clear that the legislature intended to leave this "reasonable time," indefinite, and to depend upon the peculiar circumstances of each case. The act provides, that if there be fraud, or if there be a demand and refusal, the tenant's right of renewal is forfeited, or if he neglect to make the payment within a reasonable time after the demand.

What is meant by reasonable time in any case, I appre-

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and without any fine of renewal, yet by subsequent events, and from the immense fine that has been exacted from James Hussey by the archbishop of Dublin, the nature of the property has been so changed, that unless the tenants deriving under him would contribute proportionally to the fine, it would now be attended with great loss to him to renew; and the case of *Davis* v. *Hone*, 2 *Scho. and Lef.* 341, has been relied on in support of this argument; and indeed had it not been for that case, I do not believe that the plaintiff's right of renewal would have been resisted. It is always unsatisfactory to abstract altogether the reasoning of the court in any reported case from the facts to which that reasoning is meant to apply; it has a tendency only to misrepresent one judge, and to mislead another. The case of *Davis* v. *Hone* was peculiarly circumstanced, and the contract, that is the covenant between those parties, admitted of modification; but the decision of the same learned judge, in the case of *Evans* v. *Walshe* 2 *Scho. and Lef.* 519, reported in the same book, manifestly proves, that it is not to a case like this that his lordship's reasoning in *Davis* v. *Hone* is meant to apply. Then the circumstances of the case of *Evans* v. *Walshe* are not to be distinguished in substance from the present case. (Here his lordship stated the case of *Evans* v. *Walshe*.)

hend this court will determine by analogy to other contracts of the same nature, and the doctrine of the court as applicable to those cases. It is perfectly settled, that this court will relieve against length of time, that is to say, that this court, which will not countenance fraud, or assist unfair dealings, and is scrupulous in the exercise of this branch of its jurisdiction, will compel the specific performance of an agreement for the purchase, or sale of a real estate, although the time limited for its completion has expired, and although the party seeking relief could not maintain an action for the non-performance of the agreement, unless time be of the substance of the contract; as in agreements for the purchase of reversionary interests, or of property for a particular purpose which would be defeated by delay. Here time was not of the substance of this contract in its origin: nor is it to be made so by this act; but there is a discretion given to this court, looking to all the circumstances, to say, whether the tenant has neglected to comply with the demand within a reasonable time after it was made general.

The doctrine of the court, as applicable to contracts of the same nature, must determine what is "reasonable time" under the Tenantry Act.

When time is not of the substance of a contract, a specific performance will be decreed; though the period for its completion has elapsed.

It was a favourite maxim of Lord Kenyon in interpreting any indefinite, or ambiguous term, "*noscitur a sociis.*" Look then to the other provisions connected with, or ac-

If there be fraud or a demand or refusal, or a de-

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But it is said, that this was an opinion on a motion for an injunction, and not a deliberate judgment, on a hearing on pleadings and proofs; I do not think that that objection can have much weight. Where all the facts appear upon the bill and answer, and there is nothing in dispute between the parties but the law of the court, it is very common both in this court and in England, to decide the question upon motion; there are many instances in the reports in Lord Redesdale's time, and in the cotemporary reports; it is a great saving of expense to the parties, and the judgment of the court is equally entitled to weight and authority.

It is in equity very common to decide a question on motion, where all the facts appear upon the bill and answer, and there is nothing in dispute, but the law of the court.

When this case was first stated, I thought it very much resembled in principle those cases of contract, where a material change in the value of the property had happened after the equitable title was complete, and before the legal conveyance was executed; in which cases, whether it be to enhance or to reduce the value of the property, it falls upon the purchaser; as for instance, if a reversion be contracted for, with one or more good lives upon it, and after the contract is entered into, but before the conveyance is executed, all the lives fall in, the purchaser may enforce the agreement in Equity, although the estate, by the events that had happened, had become worth double the sum agreed upon for it;

Where the equitable title is complete a legal conveyance will be decreed, though the property may have been much enhanced, or de-

mand and neglect to renew in a reasonable time, the covenant is forfeited.

companying that, upon which the doubt arises. Here, if there be fraud, or if there be a demand and refusal, or if there be a demand, and a neglect to pay within a reasonable time, the covenant is forfeited; that is to say, although there be no absolute refusal, yet if there be such a neglect, as manifests a wilful default, such as amounts to a refusal, or is evidence of fraud; as for instance, if the tenant take no notice of the demand, or no step to comply with it, or if he is looking to an advantage to himself from the delay, to the prejudice of his landlord, this is unfair dealing, and the court will not assist the tenant so conducting himself. I look to "reasonable time," not as confined to the consideration of time alone; if it were, it would be a definite period; but as requiring the tenant to account for the delay, to shew that he had neither abandoned the contract, or wilfully neglected the performance of it: and it then remains with the court to say, whether he has accounted for it in a satisfactory manner.

"Reasonable time," in mercantile transactions, not applicable to cases

As to what is meant by "reasonable time," in mercantile transactions, no reasoning or analogy can possibly be deduced from them, as applicable to contracts respecting real property. The payment of a bill of exchange, and of a mortgage debt, bear no resemblance to each other; and

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preciated in value.

Subsequent events will not in equity vary a contract fairly entered into.

see *White* v. *Nutt*, 1 *P. Wms.* 61; so on the other hand if the estate be depreciated, the contract will be enforced against the purchaser. The defendant's counsel have referred to a *dictum* of Sir J. Jekyll, in the case of *Stent* v. *Baylis*, 2 *P. Wms.* 217, but that *dictum* of Sir J. Jekyll was declared by Lord Eldon, in *Mellor* v. *Payne*, 6 *Ves.* 349, to be unsupported; and indeed, the case of *Mellor* v. *Payne*, and that of *Mortimer* v. *Capper*, 2 *Bro. C. C.* 154, have established the principle, that subsequent events will not vary a contract fairly entered into.

When the contract is unreasonable at the time of its being entered into, it will not be enforced.

Mr. Radcliffe referred to the case of *Faine* v. *Browne*, 2 *Ves. Sen.* 307, where a man being entitled to an estate under his father's will, with a provision, that if he sold it within a certain period, half the purchase money should go to another; he being a drunken fellow, had agreed to sell it, and refused to execute the contract, and a bill was brought to compel the performance; but Lord Hardwicke dismissed the bill; and why? Because the contract at the time of entering into it, was unreasonable, as the vendor was in effect selling his patrimony for half its value. The point that has been considered in all the cases, and on which they all turn, is, was the transaction, when originally entered into, fair and reasonable? Was there no undue advantage taken; nothing

of contracts respecting real property.

the parties are placed in situations perfectly distinct. Punctuality is of the very essence of commercial dealings. If the merchant is delayed, he is ruined, his various engagements to others require the utmost exactness and precision; his credit and character as a merchant, depend upon his punctuality; but that is not the case of a mortgagee, or the doctrine of this court as applied to bills of foreclosure, or redemption. In *Freeman* v. *Lord Waterford*, 1 *Scho. and Lef.* 451, *n.* Lord Clare says: "That the precise time to be allowed to the tenant cannot necessarily be defined; it must depend upon the difficulties which he may fairly have to encounter, in complying with the demand." And in another part of his discussion in that case, he says: "If no time was limited by the lease, I should strongly incline to adopt the rule by analogy to the statutes, giving the remedy by ejectment for non-payment of rent, and to determine, that the tenant coming into a court of Equity for a renewal after six months, from a demand made upon him, ought to be able to account for his neglect." Lord Clare is certainly a very considerable authority, and in the construction of an Irish act of Parliament, giving jurisdiction to this court, entitled to much respect But I have some difficulty in adopting that rule generally; for if the

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Courts of Equity have no power to alter the contracts of parties, from an eventual change not contemplated at the time.

The discretion of the court in granting or refusing a specific execution, is regulated by established principles.

suppressed, nothing mistaken? If it were so, I do not know what authority this court has to vary men's contracts, because eventually they have become more advantageous to one party, or more prejudicial to the other, than was contemplated by either. Lord Redesdale, in *Evans* v. *Walshe*, says, if the defendant will not renew, let him permit the plaintiff to stand in his situation; the same offer is made in this case.

Another topic has been insisted upon by the counsel for the defendant; that it is in the discretion of the court to decree or refuse the specific execution of a contract. It is so; but that discretion is regulated and restrained by principles as well known and established as any other branch of the law of this court: see *Goring* v. *Nash*, 3 *Atk.* 187, and the period at which the court is to examine the agreement between the parties, is the time when they contracted; for if the court were, as is contended for, to vary an agreement deliberately entered into by the parties, from the happening of subsequent circumstances, I do not know when it would stop. Suppose a case, that very frequently occurs, of a colliery, where the company has contracted to supply Iron works at a price agreed on; surely it can be no ground to rescind it, that subsequent circumstances have occurred to render it very

tenant has the money in his pocket, why is he to withhold it from his landlord for six months, and not to be accountable for his delay until the expiration of that period? But that was not the case of the plaintiff in this cause, and if Lord Clare's rule were applied here, the six months expired in June, and in July the timber would have been sold, and the arrears paid off, but for the interruption of the defendant himself; and when it is recollected, that there was this fund, which both parties knew was the only fund to which the plaintiff could resort from the difficulties and embarrassment brought upon him by his guardian during his minority, and which in my view of the case goes very far to account for all the delay, I see nothing wilful in the plaintiff's conduct to create a forfeiture of his interest in this lease. From July the delay is occasioned by the landlord; neither party appears to have abandoned the contract, except from what appears by the injunction bill, and which was defeated; and there is no fraud practised by the tenant.

Not feeling myself bound down to any particular time, but at liberty to look to all the circumstances of the case, I find no delay, that is not sufficiently accounted for, and I see no reason, therefore, to deprive the tenant of the co-

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prejudicial; that the coals may have greatly increased in price; that the expenses of working the mine may have been considerably raised. So in cases where the subject of the agreement is that in which adequate relief cannot be given at law, this court will interpose, where the contract was, at the time it was made, perfectly fair and reasonable.

It is then said, the plaintiff has no remedy at law; why that is perhaps additional reason for granting relief here. Since then it happens that in this case there is a hardship, or an inconvenience, where ought it to fall? On him who has taken it upon himself, or on him who is expressly indemnified against it, and who has purchased his interest at full value. Surely, to refuse relief in this case, would be to give the defendant James Hussey the benefit of a fraud, which he has enabled the defendant to practise upon the plaintiff.

For these reasons, I think the plaintiff entitled to the relief he prays; but being a fair question, and one raised by the decision of *Davis* v. *Hone*, I decree the renewal, without costs.—*Ball and Beat.* 280.

venant for renewal. In the foreclosure of a mortgage the slightest ground will induce the court to extend the time of sale beyond the usual time; and if the mortgagor were to state that sufficient timber was growing on the lands to discharge the mortgage, and that he was ready to apply it to that purpose, surely, the court would not suffer the estate to be sold; so here it shall not be forfeited. This is not the case of a measuring cast; there must be wilful default, and I do not think that that is established by the facts of this case.

The slightest ground will induce a court of Equity to extend the time of sale in a foreclosure cause.

I shall therefore decree the plaintiff entitled to a renewal upon the usual terms, and I am bound to give the landlord his costs.—2 *Ball and Beat.* 81.

Observations on the Case of Jessop v. *King.*

Observations on *Jessop* v. *King.*

It seems to be a great hardship on the landlord not to suppose that arrears of rent made a part of the laches which the tenant was bound to repair, before he could entitle himself to the interposition of a court of Equity, to protect him against the legal consequences of having broken his covenant with his landlord. The covenants for perpetual renewals in Ireland generally make the renewal

Do arrears of rent, make part of the laches, which the tenant is bound to repair, in order

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Lord Frankfort v. *Thorpe.*

Nov. 23, 24—1813.

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The mode agreed on to carry a contract into effect, is as much binding on the parties, as the contract itself.

The plaintiff being possessed of the lands of Churchtown for a term of years, under a lease from the archbishop of Dublin, on the 22d April, 1801, demised twenty-one acres of those lands to the defendant, for twenty-one years, at the annual rent of £215. The lease contained the following covenant:

"And the said Lodge, Lord Baron Frankfort, for himself, his heirs, &c. doth covenant, promise, and agree to and with the said James Thorpe, his executors, &c. that he the said Lord Frankfort, his heirs, &c. shall and will from time to time use his endeavours to procure from his Grace the Lord Archbishop of Dublin, under whom he derives his title to the said premises along with other lands, and his successors, such renewal and renewals of his new lease of said premises, as shall enable him or them to renew this present demise to the said J. Thorpe, his, &c. for the further term of twenty years; and that he the said Lord Frankfort, his &c. shall and will accordingly from time to time, as often as he or

Therefore where a lessor agreed to demise for a longer term than he was possessed of, and to carry it into effect, he cove-

to preserve his right to a renewal.

grantable on the condition of paying up, not only the fines, but the arrears of rent. The equity arises on the principle of permitting the tenant to repair the breaches of his covenant on adequate compensation; and it would seem that where the condition of the covenant includes rent, as well as fines, the court would require the tenant, on general principles of equity, to pay up his rent as well as fines, before he could entitle himself to the favour of the court; and that on one obvious principle of equity, amongst others, namely, that he who seeks equity, should do equity. This leads to a notice of what are these general principles. The maxims which pervade the whole system of judicature in the court of Equity, many of which are commented upon in Francis's Maxims, are, 1st, He that will have equity done to him, must do it to the same person. 2d. He that hath committed iniquity, shall not have equity. 3d. Equality is equity. 4th. It is equity, that that should make satisfaction, which received the benefit. 5th. It is equity, that that should have satisfaction, which sustained the loss. 6th. Equity suffers not a right to be without a remedy. 7th. Relieves against accidents. 8th. Prevents mischief. 9th. Prevents multiplicity of suits. 10th. Regards length of time. 11th. Will not suffer a double satisfaction to be

Equitable maxims.

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nanted that he would endeavour to procure such renewals as would enable him to renew for the full term agreed on, the lessee paying a proportion of the renewal fine; an agreement was implied, that lessee would take such renewal, though no express covenant by him for that purpose. The lessor having renewed,

they shall obtain a renewal or renewals of the lease under which the said Lord Frankfort now holds the premises hereby demised, and the said other premises, upon the said J. Thorpe, his, &c. well and truly paying and discharging all arrears of the rent hereby reserved, and also paying unto the said Lord Frankfort, his, &c. one full third part or share of all and every such fine or fines, as he the said Lord Frankfort, his, &c. shall pay for obtaining such renewal or renewals of the said lease under which he the said Lord Frankfort now so holds the said premises hereby demised, and the other parts, together with lawful interest thereof, from the respective times of the said Lord Frankfort, his, &c. paying the same, execute to the said J. Thorpe, his, &c. a renewal and renewals of the said term hereby demised, for such further term and terms for years as shall, together with the term of twenty-one years hereby granted, amount in the whole to the term of forty-one years, to be computed from the 25th March then last past: It being the true intent and meaning of these presents, and the several parties hereto, that the said J. Thorpe, his, &c. he and they paying the rent, and performing the covenants and agreements herein-before contained on his and their part to be paid and performed, and also paying one-third part or share of all such fines as the said Lord Frankfort, his, &c.

taken. 12th. Suffers not advantage to be taken of a penalty or forfeiture, where compensation can be made. 13th. It regards not the circumstances, but the substance of the act. 14th. Where equity is equal the law must prevail.

The courts have decreed the payment of rent, as well as of fines, before renewal granted.

In the great case of *Anderson* v. *Sweet*, on which this equity in Ireland mainly depends, because by it the scale of compensation has been established; rent, as well as fine, made a part of the condition, and the tender by the tenant was of rent as well as of fines; and the decree of the court was for the payment not only of the fines and interest thereon, but of arrears of rent, accates, duties, and an heriot; so that the court required many other things than the payment of fines before it would restore the tenant to his rights, under the covenant which he had broken. And in the next case, *Ross* v. *Worsop*, the condition of the covenant included rent as well as fines; and the court decreed relief on the payment of the arrear of rent, as well as of fines. And the Editor apprehends that both courts of Equity in Ireland have generally, or always, acted on the principle of making the payment of the arrears of rent, as well as of the fines, a condition precedent to the granting of relief.

Lord Manners, in this case of *Jessop* v. *King*, raises a

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has a right to call on lessee to declare whether he will renew or not.

But whether the lessee, by refusing to renew as often as the lessor renewed, forfeited all benefit of renewal, *Quere?*

shall from time to time pay for any renewal or renewals of the lease under which he now holds the hereby demised premises, and the said other premises, with interest as aforesaid, shall have a lease of the premises hereby demised for a term of forty-one years, to be computed from the 25th March last past as aforesaid, but no longer, subject however to the like covenants and agreements, on the part and behalf of the said J. Thorpe, his, &c. as hereinbefore reserved and contained."

On the same day Lord Frankfort demised to the defendant another part of the lands of Churchtown, containing fourteen acres, for the same term, at the annual rent of £124 13s. 4d.; in this lease there was a covenant similar to the one above stated, except the renewal fine was one full fourth part of all and every such fines as the plaintiff should pay to the archbishop, on every renewal of the lease under which the plaintiff then so held the premises thereby demised. The plaintiff, on the 6th Jan. 1810, obtained a renewal of his interest in the lands of Churchtown, from the Archbishop of Dublin, for the term of twenty-one years from the 25th December, 1809, for which he paid £1402 9s. 11d. as a renewal fine. On the 18th of the same month the plaintiff caused a notice to be served on the defendant, informing him that

question which he declines to determine; on which he says, "that being desirous of communicating his doubts to some of the barons of the Exchequer, he had done so, and received doubts only in return." The question raised by his lordship is: Whether the provisions of the Tenantry Act, working a forfeiture of the tenant's right of renewal, extended to a demand made by the landlord of an arrear, including rent as well as of fines, or to a demand of fines only? His lordship says, "that the impression on the minds of the barons whom he consulted, appeared to be, that the landlord is entitled to demand payment of the rent." The Editor submits, that the doubts thus entertained by the two great equity courts of Ireland, may admit of the following solution:

The Tenantry Act is two-fold; declaratory and enacting; the declaratory part is the old equity of Ireland, as set out in the preamble of the statute, (*vide ante, p.* 96, 140,) and as described by the Master of the Rolls in England, 3 *Ves. Jun.* 297, namely, that a renewal might be claimed in a case of mere neglect at any distance of time. The revival of this equity is therefore the declaratory part of this statute; and this is still the equity of Ireland, in all cases which may happen to be *outside* the operation of the statute.

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he had obtained a renewal from the archbishop of Dublin, stating the terms, and that the plaintiff was ready to execute a renewal of the first-mentioned lease, pursuant to the covenant, upon being paid £467 9s. 11d., being the amount of one-third of the fine paid to the archbishop; and the plaintiff required the defendant by the notice, to pay that sum, and to accept of a renewal. A similar notice was also served respecting the second lease, the renewal fine amounting to £358 12s. 3d. being one-fourth of £1402 9s. 11d. On the defendant refusing to pay the fines, and to accept of a renewal, the present bill was filed; it charged that the plaintiff had obtained the renewal, in order to enable him to perform the covenant so entered into by him with the defendant, and to preserve the defendant's interest, in hopes that the defendant would have reimbursed him the amount thereof. The bill prayed, that the defendant might be compelled to pay to the plaintiff such proportion of the renewal fines as he was bound to do, together with the interest due on such sums, agreeable to the covenants in the leases, upon the plaintiff executing to him renewals, agreeable to the covenants. Or, in case the court should be of opinion, that under the construction of the covenants, the defendant was not bound to accept such renewals, and pay such proportion of the re-

The enacting part of the statute adds an additional ingredient to the old equity, by enabling the landlord, on a demand to circumscribe this indéfinite indulgence of the tenant; or as Lord Manners expresses it, "to make that definite which before was indefinite."

It is therefore clear that there are, and since the Tenantry Act, always have been, *two* equities in Ireland on this subject, each of them different from the equity of England, namely, the old equity of Ireland, and the equity of Ireland under the Tenantry Act. The former recognized and declared by the statute; and the latter created by it. And therefore a case not being within the statute, may lie within the old equity, and if so should be decided by it.

The Editor apprehends that this view of the case must solve the difficulty, suggested by Lord Manners. It is true that the word "rent" does not occur in the Tenantry Act; and the payment of the fines is the condition by which the forfeiture is to be decided under the statute. This act of Parliament gives to the landlord a more summary forfeiture than he had before; unpunctuality of payment by the tenant after demand works a forfeiture of his equitable interest, however valuable, even on the drop of one life. But to work this statutable forfeiture, which is an

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newal fines, and that he should still refuse so to do, that the defendant might be decreed to have forfeited all claim to any further renewal of the said leases under the said covenants. The defendant by his answer stating, that it was not covenanted by him in the leases to take any renewal from the plaintiff, insisted that it was optional with him either to take out a renewal or not, at any time previous to the determination of the lease then existing; and that he was not then bound to make his election. The answer further stated, that the sums claimed by the plaintiff as renewal fines, were one-third and one-fourth of the entire fine paid by the plaintiff, for a renewal of the lease of all the lands he held under the Archbishop of Dublin, containing upwards of 100 acres: the answer insisted, that the covenants in the leases meant only one-third and one-fourth of the fines which should be ascertained as the proportions that the two lots demised to the plaintiff were subject to, upon a fair calculation of the whole fine, divided and proportioned according to the number of acres contained in each lot, or the rent payable thereout; the answer therefore contended, that the demand made by the plaintiff was unjust and unreasonable, and not warranted by the true intent and meaning of the covenant.

additional restriction on the tenant, the landlord and the court must follow the statute. And the court, as here exercising a peculiar equity prescribed and limited by the act of Parliament, will ask itself strictly, what is this unpunctuality, according to which this interest must be forfeited? The statute answers that question; it is an unpunctuality in the payment of fines, and not as to rent, for the statute does not say so. And therefore the court will not presume it, in admitting the summary forfeiture granted to the landlord. In any case where a fine is payable, and laches committed respecting its payment, I think the parties may proceed under the act of Parliament; and if the case should not fall strictly within the statute, as the Editor apprehends it would not, if the demand were for rent; yet still the case may lie within the principle of the old equity, and be decided thereby according to the cases before the Tenantry Act; giving to the landlord his right to rent, and to the tenant his old and greater claim on the indulgence of a court of Equity.

The court can try the case with both those equities in its hand, and adapt to it, whichever of the two it may deem applicable; but the Editor apprehends it will select either, and not combine an equity from both.

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Mr. Whitestone, *Mr. Burton*, and *Mr. Hutchinson*, for the plaintiff.

The plaintiff is entitled to have it decreed, that the defendant is bound to take a renewal for twenty-one years, on paying one-third and one-fourth of the fine paid by the plaintiff to the archbishop; or, in case the defendant shall refuse to accept of a renewal, the court will declare, that the defendant has forfeited all right and claim to a renewal. The defendant insists, that he has an election whether he will renew or not: we admit he has, but we contend that he must make that election now, as it would be ruinous for the plaintiff to take a renewal from the archbishop, unless the defendant would afterwards renew. It is a mutual agreement, that the lease shall from time to time be surrendered by the defendant, and a new lease granted, on paying those renewal fines, which are now, by the regulations of the see, paid annually; although the defendant insists, that he is not bound to decide whether he will or not, till the twenty-one years are expired; yet the meaning of the parties was, that the plaintiff should renew, in order to enable him to make new leases to the defendant. The next question is, what is the proportion of the fines that the defendant ought to pay. The parties have stipulated expressly

The next case is:

Barrett v. *Pearson.*

19th June, 1812.

A tenant having by his conduct made his title to a renewal doubtful, and thereby rendering a suit for it necessary, was, on obtaining a renewal, decreed to pay all the costs.

The plaintiff being assignee of a lease, whereby certain houses were demised for three lives, with a covenant of perpetual renewal upon the payment of £3 5s. by the tenant on the renewal of each life, in July, 1805, applied to James Pearson, in whom the reversion had vested, to grant him a renewal in the place of two lives that had dropped. Pearson agreed to renew, provided the plaintiff would satisfy him, that he was the person entitled to the renewal, and requested the plaintiff, for that purpose, to lay his title deeds before Jackson, his attorney, who in his depositions stated,

That having inspected the title deeds, deponent mentioned to Pearson, that he conceived the plaintiff to be entitled to the renewal; whereupon Pearson declared he was ready to grant such renewal, upon being paid the fines that were due: that shortly afterwards, the plaintiff sent to

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that on the plaintiff renewing, the defendant is to pay one-third and one-fourth of the entire fine, paid by the plaintiff for all the lands he holds under the archbishop; and although that may now appear somewhat unreasonable, yet parties, on entering into a contract, may stipulate for any terms. It frequently happens that a lessor covenants to renew with the tenant at a fine certain; yet if it should afterwards happen, that the renewal fine payable by the lessor himself, should be considerably increased, the court has decided that the lessor was bound by his covenant: it was decided by your lordship in *Revell* v. *Hussey*, *ante*, *n.*

The *Solicitor-General*, *Mr. Ridgeway*, and *Mr. Lefroy*, for the defendant.

The plaintiff, by the bill, calls on the defendant to accept of a renewal, and to pay fines, according to his own construction of the covenants, which we contend to be both unreasonable and unconscientious; it is certainly very doubtful whether the covenants can bear the construction contended for by the plaintiff. In *Harnett* v. *Yielding*, 2 *Scho. and Lef.* 549, Lord Redesdale says, that where it is doubtful whether a party meant to contract to the extent that he is sought to be charged, equity will refuse to enforce the contract. This proves that this court will not assist unrea-

deponent to draw and prepare a renewal of said lease, and to know what the probable expense of preparing the renewal would amount to. Deponent informed the person who so applied to him, that he would draw the renewal for two guineas, on being furnished with the necessary stamps: the person then mentioned to deponent that he would apply to the plaintiff to know whether he would have such renewals prepared; in a few days after, the same person informed deponent, that the plaintiff would not have the renewals prepared, as he considered the sum of two guineas too much for deponent's trouble in preparing same: deponent returned the plaintiff's title deeds, and desired the person to inform the plaintiff, that if he got the renewals prepared, deponent would read them on the part of J. Pearson, without any expense to plaintiff: and at the same time deponent desired said person to tell the plaintiff, to beware of losing his right of renewal. In April, 1807, J. Pearson died, and by his will he devised his estates to the defendants, Matthew and John Pearson, in trust for his children, who were minors. The plaintiff in October, 1809, caused a notice to be served on the defendants, the trustees of the will of James Pearson, calling on them to grant him a renewal for the two lives therein

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sonable covenants, where the construction is doubtful. The plaintiff has not kept his covenant, that he would use his utmost endeavours to obtain renewals from the archbishop; it is well known that he might have obtained renewals annually, by which the fine would have been very small; instead of that, he has permitted nine years to elapse without renewing; and through this neglect the fines are enormously increased by compound interest. Surely the defendant ought not, at all events, to contribute more than what the plaintiff would have paid had he renewed annually, as he was bound to do. The bill calls on the defendant to renew now, or to be for ever foreclosed. This is really to make a new covenant; for there is nothing imperative on the tenant to renew, or if he do not, to be foreclosed. It is with the plaintiff to decide, whether he will annually renew with the archbishop, or at the end of the term of twenty-one years. No time is specified in the covenant for the tenant to pay the fines; the plaintiff is bound, on the expiration of the present lease, to be in a condition to renew with the defendant for a further term of twenty years, but it is left open to him to adopt whichever mode of renewal he may choose; for at the end of the term the defendant will be obliged to reimburse him one-third and one-fourth of his fair proportion

named, and requiring them to furnish him with the amount of the renewal fines, and the interest due on them, in order that he might pay the same; and that in case they would not comply with those requisitions within the time mentioned, that he, the plaintiff, would file a bill in equity in order to obtain a renewal. To this notice no answer being returned in the November following, a notice to the same effect was served on the defendants; and at the same time a sum of money was tendered to them, as the amount of the renewal fines, together with the draft of a renewal; both of which the defendants refused to accept, and gave no answer to the notice.

The solicitor for the plaintiff stated, that he had some conversation with the defendant John Pearson, relative to the notice that had been served on him by the plaintiff; and the reason he assigned for not complying with the terms of the notices was, that he was a trustee for minors; and at the same time he expressed a wish that nothing should be done in the business until the persons interested in the premises should arrive at age, which would take place in about two or three years.

The present bill was filed by the plaintiff in May, 1810, against the trustees of the will of James Pearson, and

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of the fine, with interest; for the plaintiff, by the covenant, has reserved interest on the fines advanced by him, to be paid by the defendant, if he omits paying the fine. Does not this prove that the plaintiff contemplated a delay might arise, and has provided a compensation for it? Therefore the court will not, when he has provided a remedy for himself, grant him any assistance.

The *Lord Chancellor.* I have looked over the leases from Lord Frankfort to the defendant, and I think, upon the fair construction and effect of them, Lord Frankfort is entitled to some degree of relief upon this bill. Two questions are raised by the defendant: first, what proportion of the renewal fine the tenant is bound to pay: and secondly, whether Thorpe is compellable to renew with Lord Frankfort as often as the plaintiff renews with the archbishop; that is to say, whether this amounts to a *toties quoties* covenant? As to the first question, the lease expressly provides, that the tenant should pay one-third of the whole of the renewal fine; for it is, that he shall contribute one-third of the fine paid by Lord Frankfort to the archbishop, for those and other lands comprised in the original lease; there is no distinct or separate fine paid to the archbishop for the lands comprised in Thorpe's lease, and a different arrangement would have been made,

against their *cestui que* trusts, the minors to obtain a renewal of the two lives that had dropped, offering to pay all rent and renewal fines due.

The trustees, in their answer, admitted the title of the plaintiff as set forth in the bill. They stated, that on being informed by Jackson of what had taken place between him and the plaintiff in 1805, and that from that period nothing further had been done by the plaintiff to obtain a renewal until the latter end of 1809, when he caused the notice to be served, they were apprehensive it would be improper for them, as trustees for minors, to grant a renewal, unless they were sanctioned so to do by the direction of the court.

It appeared, that the plaintiff not having proceeded with the case according to the due course of the court, the defendants, the trustees, had endeavoured, but without effect, to dismiss the bill for want of prosecution.

Mr. Plunket, *Mr. Burne*, and *Mr. Keatinge*, for the plaintiff. The *Solicitor-General*, *Mr. Boyd*, and *Mr. Dickson*, for the defendant.

The *Lord Chancellor*.—It cannot be contended that a forfeiture has in this case been incurred. The only question that arises is, on what terms the renewal sought by the bill

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It is usual and perfectly reasonable that in derivative leases the tenants should contribute to the renewal fines in proportion to the quantity and quality of the land comprised in his lease.

if Thorpe were to pay only one-third of the fine to the archbishop, in respect of the lands comprised in his lease; something would have been done to have brought that to a greater degree of certainty; but it is unusual, and perfectly reasonable, that in these derivative leases, the tenant should contribute in proportion to the quantity and quality of the land comprised in his lease; and looking to what is contained in the original lease, there is nothing exorbitant or unreasonable in this case, and the words of the lease are express. The next question is, whether the tenant is bound to renew with Lord Frankfort, as often as Lord Frankfort renews with the archbishop. The doubt is raised by the omission of any express covenant on the part of the tenant to take a renewal. But Lord Frankfort covenants, that he will endeavour, from time to time, to procure such renewal and renewals from the archbishop, as shall enable him to renew the present demise to J. Thorpe for the further term of twenty years, and that he will accordingly from time to time, as often as he shall obtain a renewal or renewals of the said lease, upon the said J. Thorpe paying and discharging all arrears of rent, and paying one full third part or share of all and every such fine and fines, as Lord Frankfort shall pay for obtaining such renewal and renewals, with lawful interest from the res-

ought to be granted. I apprehend that if a tenant so conduct himself, as to make his title to a renewal doubtful, and render a suit necessary, he must, on the principle of the statute, and the authority of the case of *Deane* v. *Lord Waterford*, 1 *Scho. and Lef.* 451, *n.* before Lord Clare, pay the costs.

Then consider the circumstances of this case. Here in the life-time of Pearson, the testator, an application for a renewal was made by the plaintiff, the tenant, which was agreed to, but then declined by the plaintiff, on account, as he alleged, of the expense of the conveyance, which Jackson, on behalf of the testator, was ready to prepare; and Jackson then said, that the plaintiff had better take care lest he should lose the benefit of the covenant for renewal; and as the expense of the conveyance was so very trifling a sum, it is most probable that the real objection the tenant then had was, his being unprepared to pay the amount of the renewal fines. It therefore was his fault not to renew at that time; and though I cannot concur with the inference Jackson in his evidence draws from this transaction, that the plaintiff had forfeited his right to a renewal, yet his conduct has certainly raised a doubt. Nothing further is done till 1809, after the death of the testator, when the tenant applied to the defendants, the trustees in the will of the

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pective times of paying the same, execute to the said J. Thorpe, his executors, and assigns, a renewal and renewals of the said term for such further term and terms of years, as with the present term of twenty-one years shall amount to the term of forty-one years; it being the true intent and meaning of these presents, and of the several parties thereto, that the said J. Thorpe paying the rent and performing the covenants and agreements therein contained, and also paying one-third of all such fine and fines of renewal, shall have a lease of the premises for the full term of forty-one years. Does not this necessarily imply, that J. Thorpe, will take a renewal? The agreement is, that Thorpe shall have a lease in the whole for forty-one years: the mode of effecting this agreement is, that Lord Frankfort shall renew with the archbishop, and from time to time shall renew with the archbishop, and from time to time shall grant renewals to Thorpe; and I think both parties as much bound by the mode of carrying the agreement into effect, as by the agreement itself. As to the interest to be paid on the fines, it does not postpone the demand in this, any more than in any other case where interest is reserved; but it is to compel punctual payment, or to make compensation for delay. Lord Frankfort then having renewed, now calls on the tenant to

A stipulation to pay interest does not postpone the demand, but is to compel punctual payment, or to obtain compensation for the delay.

testator, for a renewal; who, after the delay that had taken place, and the information they obtained from Jackson of the transaction above-mentioned, entertained doubts whether the plaintiff was entitled to a renewal; and I think that as trustees for minors, they were fully justified in refusing, till they had the opinion of the court on the question, whether the conduct of the defendant in 1805 was not a forfeiture of the right of renewal; and if they did endeavour to dismiss the bill for want of prosecution, they were right, as the bill might have been brought to a hearing before their *cestui que trusts*, who were minors, had attained their full age. But surely that is no ground whatsoever to disentitle the minors to their costs.

Being therefore satisfied that the tenant having neglected to avail himself of the offer made by the testator to grant him a renewal, the trustees were justified in refusing the application made to them, and that the plaintiff has, by his own conduct, and the manner in which he has transacted the business, made this suit necessary.

I must therefore declare the plaintiff entitled to a renewal, upon the terms of paying all the fines in arrear, and the costs the trustees and *cestui que trusts* have been put to in this cause. 2 *Ball and Beat.* 189.

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perform his part of the contract, and to declare whether he will or not renew. I think he has a right so to do; but the tenant says, he has the whole of the time to consider whether he will do so. Now it is very probable that Lord Frankfort may have no interest in renewing for the lands contained in the defendant's lease, but for the purpose of fulfilling his contract with the defendant. But I have a doubt, whether I can now declare that the defendant has forfeited all benefit of renewal, if he refuses at this time to renew. But if I should be obliged to dismiss the plaintiff's bill, I would declare as a reason for so doing, that the defendant being called upon to renew, had declined to comply therewith; and I am very strongly of opinion, that if, after this, the defendant should file his bill for a renewal, Lord Frankfort might successfully resist it.

An inquiry was, at the instance of the defendant, directed under what circumstances Lord Frankfort renewed, and whether he might have renewed upon better terms; and all further directions reserved, till the further hearing of the cause. 2 *Ball and Beat.* 372.

Observations on the Case of Barrett v. *Pearson.*

The position established by this case is so obvious, that it does not afford any ground for observation.

The next case is *Winslow* v. *Tigh*, 2 *Ball* and *Beat.* 193, and which is no farther applicable to the subject of this treatise, than as recognizing the principle that, Whoever has a lease has an interest in the renewal, and when an additional term has been granted, the old term may be said to be still in existence. And that the tenant's right of renewal is a part of his interest in the lease.

Lessee has an interest in the renewal.

The next case is: *Revell* v. *Hussey*, *vide note.*

The next case is: *Lord Frankfort* v. *Thorpe*, *vide note.*

The next case is:

Jackson, Appellant.

Saunders, Respondent.

June 27, July 25, 26, 1814.

This case arose upon a bill, (filed April 20, 1801,) in the nature of a bill for specific performance, filed in Chan-

Leases for lives renewable for

Magrane, Appellant.

Church Leases.

Elizabeth Archbold and others, Respondents.

May 7, 1813.

[Appeal from the Court of Exchequer.]

Mrs. Archbold was in 1789 possessed of a Church Lease, of certain lands, about sixty-two acres, in the vicinity of Dublin. In that year she demised the lands to one Magrane, at the yearly rent of £171, 15s. 11d. taking at the same time a fine of £70. Mr. Archbold also covenanted that as long as she held the head lease in question, and as often as she obtained a renewal from the archbishop, she, her executors, administrators, and assigns, would renew the sub-lease to Magrane, his executors, administrators, and assigns, under a penalty of £70. Her husband had died the year before, and she was administratrix for her children.

Sub-lease at a fixed rent, with covenant of perpetual renewal under a penalty of £70, made of a church lease held by an administratrix for the benefit of her children and herself. Whether such a lease can be supported, except by con-

Mrs. Archbold soon after obtained a renewal of the head lease, and in 1793 renewed the sub-lease to Magrane, in terms of the covenant. In 1806 Magrane assigned his interest to his son, the

ever, demand, forfeiture.

Demand for fines made under the Tenantry Act, on 6th Oct. 1800, (after all the lives had dropped; one in 1789, another in 1791, and the last in August 1800; and repeated applications since 1798 for payment,) and no tender till March, 1801, after ejectment brought by the landlord. Held, that the tenant had forfeited his right to renewal; the offer to pay and renew being considered, under the circum-

cery, to compel renewal under a lease for lives renewable for ever. The lease was made in 1699 of the lands of Cumber, King's County, by a Mr. Weaver, the then proprietor, to two persons of the name of Lamb, for three lives, with covenant for perpetual renewal. In 1724 the estate and inheritance became vested in Robert Saunders, the Respondent's ancestor, to whom the joint lease was surrendered by the Lambs; and he granted two separate leases, one to each of them, for three lives, with covenant for perpetual renewal. The covenants in the lease of the north-west part of Cumber (those in the lease for the south-east part being the same) were in these words: "And the said Robert Saunders doth for himself, his heirs and assigns, covenant to and with the said Robert Lamb, his heirs and assigns, that as often as it should please God to take away by death any of the before named Edward Lamb, Richard Lamb, and Thomas Mitchell, (the lives in the said indenture named,) he the said Robert Saunders, his heirs and assigns, shall put in another life of such person as shall be named by the said Richard Lamb, his heirs or assigns, still to keep up three lives in the present demise. And the said Richard Lamb doth for himself, his heirs and assigns, covenant that within four months after the death of any of

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sidering the option to pay the the penalty as of the essence of the contract.

22 April, 1808. 26 June, 1809.

appellant. Mrs. Archbold obtained a further renewal from the archbishop, but refused to renew the sub-lease upon the ground that she had an option to refuse, upon paying the £70 penalty. The appellant then filed his bill in the Exchequer against her, to compel a renewal: in her answer she insisted on her aforesaid option. After the usual proceedings, the cause came to a hearing in the Exchequer, when the bill was dismissed without costs; whereupon Magrane appealed.

Sir Arthur Pigott and *Mr. Richards*, (for the Appellant,) insisted upon the known rule of equity, that the penalty was to be considered only as a further security, and the performance as of the essence of the contract. Equity would order a perpetual renewal, however hard it might be on the party, where the contract for that purpose was clear and distinct. Mrs. Archbold might relieve herself from the hardship by not renewing with the archbishop.

Sir S. Romilly and *Mr. Hart* (for the Respondents.) In this particular case the option to renew or pay the penalty was of the essence of the contract, and was the only circumstance that could make it reasonable; without this equity would not order perform-

the before named Edward Lamb, Richard Lamb, and Thomas Mitchell, he will nominate one other person, whose life shall be added to this lease, to the life or lives that then should be in being; and also then to pay to the said Robert Saunders, his heirs and assigns, one full half year's rent. *And if the said Richard Lamb, his heirs or assigns, neglect or refuse so to do, then the said Robert Saunders, his heirs and assigns, shall be allowed interest for the said fine from the death of the person or persons so dying.*" It was also covenanted, that the tenant should once in every six months, if required, procure and deliver to the landlord a credible certificate of the persons being alive whose names were in the lease, or might be in any farther lease by renewal thereof; and that a life being beyond seas and not heard of for three years should be taken as dead, and renewal accordingly, &c.

In 1755 the interest in both leases became vested in Robert Jackson, appellant's ancestor, who at that time obtained a renewal of the lease of the north-west part of Cumber, now particularly in question. One of the lives dropped in 1788, or 1789; another in 1791. No steps were taken for several years for renewal, because the tenant, as he after-

stances, as delayed for an unreasonable time.

Sentiente Lord Eldon, that the delay after the demand was unreasonable, though there had been no prior neglect, and (*concurrenti* Lord Redesdale) that no particular formality in the demand was necessary; that it need not be of a specific sum; that it need not be in writing; that no special power was necessary to authorize an agent to make the demand and

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ance, even if Mrs. Archbold had the absolute interest; for it would amount to a sale by her without consideration, in as much as the fines or rents of church lands were raised on renewal, according to the value of the property at the time. The fines might thus be raised so as to leave her no beneficial interest in the lease, but the whole must go to him who had the sub-lease at a rent certain. It was clear that Mrs. Archbold did not understand the nature and consequences of this contract at the time she entered into it; and equity would not order performance of a contract so improvident under such circumstances, though she had been possessed of the absolute interest. But she was only a trustee, or administratrix for her children, and could not be allowed to include them by a contract so unreasonable. As administratrix paying her own debt to a third person out of the effects of the intestate, the money might be followed by a legatee, even in the hands of the innocent third person.

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Willan v. *Willan* 16. Ves. 72. *Mortlock* and *Butler*. 10. Ves. 292. *Mead* and *Lord Orrery* 3 *Atk*. 235.

Lord Eldon, (Chancellor). This was clearly a case where the rule, that the penalty was not to be considered as of the essence of the contract, did not apply. The option was meant as an alternative; it was of the essence of the contract, and the only way to make it reasonable; otherwise the contract would have been bad,

Judgment.

This is not a case where the rule, that the penalty was to be considered merely as

receive the fines; that a subsequent demand was no waiver of a prior demand, unless the terms of the subsequent demand were complied with; and that, in considering what was a reasonable time after demand, prior applications and circumstances were to be taken into account.

Dubitante Lord Eldon, whether—where the tenant was taken bound, on the dropping of any of the lives, to pay a fine and nominate another life; or, in case

wards alleged in his bill, was then very much embarrassed in his circumstances.

The applications on the part of the landlord to the tenant to renew, of which there was any distinct evidence, began in 1798; and both in 1799 and 1800 several applications were made: one in 1799 by the respondent himself; another by Thomas Saunders, respondent's solicitor, in March, 1799. Applications to the same effect were made to the appellant's solicitor, Peter Jackson. T. Saunders at length wrote to the appellant himself, on the 9th July, 1800; stating, that unless the fines were paid immediately, respondent would not renew, being so advised by counsel. The appellant wrote in answer, 17th July, 1800, that he would give directions to his solicitor about it; but the solicitor, (Jackson,) on being applied to some time after, stated that he had got no such instructions. The last life in the lease dropped in August 1800. Another application was made in August or September; and at length, on the 6th Oct. 1800, T. Saunders having obtained a warrant of attorney to receive the fines, went to appellant's house, and demanded the fines from him in person, but without effect. An ejectment was then brought in Jan. 1801; and in March 1801, the appellant tendered the fines, and presented

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a further security could apply.

How these leases with covenants of perpetual renewal originated in Ireland.

This lease would have been bad though Mrs. Archbold had had the absolute interest. A *fortiori* it was because she could not bind her chil-

though she had been the absolute owner; but she was administratrix of her children, and could not bind their interests by a lease so very improvident.

Lord Redesdale. These leases with covenant of perpetual renewal arose in Ireland, instead of fee-farms. Persons purchased improveable estates; but having no money to carry on their improvements, they procured it in this manner: they paid, for exampel, £15,000, for an estate, and conveyed it to another in fee-simple for £10,000, taking a lease of the whole with covenant for perpetual renewal, at a rent equal to the interest of the £10,000. There were many such leases, and they had a claim in reason and justice to be supported.

But this sub-lease was of a different description. It would have been bad under the circumstances, though Mrs. Archbold had had the absolute interest in the original lease; but she had not that absolute interest; part of it was in her children, for whom she was administratrix. In both views it was bad, unless combined with the option of paying the penalty. How far she could bind her children, even as to the payment of the penalty, he would not say at that time.

deeds of renewal to respondent for execution; but the respondent then refused to renew. There was some question about a draft for renewal having been presented to appellant's solicitor by respondent's solicitor so late as Nov. 1800. The evidence with respect to this was that of P. Jackson, who said he found the draft among his papers on Nov. 1, 1800, and marked that date on it; and that of T. Saunders, who stated that it was prepared by him, and delivered in March 1799, or 1800. It appeared, however, to have been delivered before, or in August 1800; it being a draft for two lives; whereas the third life, as before stated, dropped in August 1800. The will for performance was then filed; and after answer, &c. the Lord Chancellor, (Redesdale,) by decree, Nov. 30, 1802, dismissed the bill with costs: and on rehearing, Dec. 1804, varied it so far as to dismiss it without costs; and the tenant appealed. Romilly and Leach for appellant; Hart and Bell for respondent.

of neglect, to pay the interest on the fine—the meaning could be, that the tenant should have the option to postpone renewal till the life was about to expire. *Sentiente*, if such was the meaning, that it was not a covenant which equity would specificially execute.

Lord Redesdale. This case depended on the construction of an Act of the Irish Parliament, commonly called the Tenantry Act, which was founded on the practice prevalent in that country of granting leases for lives, with covenant for perpetual renewal. This Act was supposed to

Observations in judgment. Lord Redesdale.

The decree of the court below affirmed, without prejudice to any remedy the appellant might have at law, &c.; possession being immediately delivered, and no writ of error to be brought in the action of ejectment brought in one of the courts below; and leave given to apply to the Lords in regard to mesne profits, pursuant to an undertaking by the agents.

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dren even to the payment of the penalty?

The action of ejectment above mentioned was brought at the expiration of the sub-lease, and judgment given in favour of the respondent. The appellant had obtained an order from the Lords to stay proceedings upon this Judgment, upon an undertaking to the above effect by his agent.

Mr. Shadwell now applied on the part of the respondents for an order for payment of the profits during eight months, being the time the respondents had been kept out of possession by the stay of the proceedings. If there should be a difficulty about a criterion of value, their lordships would give them leave to produce affidavits to that point, or remit the cause to the court below, with directions to ascertain the value and order payment.

June 2, 1813.

An objection to the jurisdiction was made on the part of the appellant, as the appeal had been already disposed of; but the Chancel-

have originated from certain decisions (*Kane* v. *Hamilton*, *ante*; *Bateman* v. *Murray*, *ante*,) of this House at that period, before the Union, when the appellant jurisdiction was exercised by the House of Lords in England. The case was simply this (states it as above.) It seemed to have been the idea of Saunders and his advisers, that a formal demand, with notice that it was intended to insist on the forfeiture in case of refusal, was necessary. It appeared to him, however, that there was nothing in the Act to show that the demand must be of that description. The words were, that courts should relieve against lapse of time "unless it be proved to the satisfaction of such courts, that the landlords, or lessors, or persons entitled to receive such fines, had demanded such fines from such tenants, or their assigneos; and that the same had been refused or neglected to be paid within a reasonable time after such demand." The true construction of this act (19 and 20 Geo. 3. c. 30,) as it struck him, was, that Courts of Equity should relieve in cases of mere neglect; that where both parties had been equally negligent, the tenant should not lose his right of renewal. But if the landlord was active, and called on the tenant to renew and pay the fines, and if the tenant neglected to do so within a reasonable time, the landlord was

The true construction of the act was, that equity should relieve in cases of mere neglect.

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lor had no doubt but the house had jurisdiction founded on the undertaking of the agents.

It was accordingly ordered that the court below should cause an account to be taken, and payment to be made of what was due up to the time of delivering possession. 1 *Dow*. P. C. 107.

Hone, Appellant.

Davis and others, Respondents.

Dec. 3, 1813, June, 1814.

Lessee of a church lease, made about 150 years ago, subleases, with covenant for renewal as long as he could renew the original lease; the *sub-*

Some time in about the year 1650, John Usher, of Mount Usher, county Wicklow, obtained a lease from the dean and chapter of Christ's Church, Dublin, of the lands of Rallymolchins, &c. in the county of Dublin, for twenty-one years, at a rent of £107 12s. 6d.; and soon after demised the same premises, for sixteen years, to Jeoffry Davis, (under whom the respondents derived,) at the yearly rent of £215 5s. being double the original rent; with a covenant for renewal as long as he could renew the original lease. It was the usage of the dean and chapter to renew

not bound to renew at all; and it was not necessary for him to say that he insisted upon the forfeiture in terms of the act, as the act itself gave him the benefit after demand and refusal or neglect to pay in a reasonable time. Then the case here amounted to this: "I have often demanded my fines, and you have not paid them; then I make a formal demand, and, if you do not renew, I insist on the benefit of the act." This last proceeding was certainly candid, and might be considered as a sort of waver of the prior demand, if the fines had then been paid without further delay. The question therefore now was, whether, after demand in October, 1800, Jackson took the proper steps to renew?

Not necessary for the landlord to say, in making the demand, that he insisted on the forfeiture in terms of the act.

Waver.

The evidence depended, first on the depositions of Mr. T. Saunders, the agent of Saunders the respondent, who made the demand in October 1800, and spoke to several prior applications to the appellant to renew: the first of which he gave an account was in the hall of the Four Courts in 1799; where he said he was present when the respondent applied to the appellant, and required him to pay the renewal fines then due. He then stated, that after making several applications personally and by letter on behalf of the respondent, he wrote to the appellant on the 9th July 1800, calling upon him to renew and pay the

Evidence.

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every seven years, at the same rent, on payment of a fine. The covenant for renewal was in these terms:

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"That he the said John Usher, his executors, administrators and assigns, shall and will, at some time before the expiration of the first seven years of his present lease from the said dean and chapter, and likewise at or some time before the expiration of the first seven years of every future lease that shall be obtained by him or them of the said lands, or at some time sooner, *make all proper applications, and use all proper endeavours with the dean and chapter, or their successors, for the renewal of the several leases* which shall be obtained from the said dean and chapter; and upon obtaining of every such renewal by the said John Usher, his executors, administrators, or assigns, he or they shall and will, from time to time, and at any time within six months after his or their giving notice of such renewal unto the said Jeoffry Davis, his executors, administrators and assigns, for the further term of seven years, to be added to the term and continuance of the present lease, and of every future lease; he the said J. Davis, his executors, administrators or assigns, accepting of every such renewal within six months after such notice, *and paying unto the said J. Usher, his executors, administrators and assigns, the sum*

lessees covenanting to pay double the rent that might be demanded by the dean and chapter, and to pay £300 of the fine; the immediate lessee covenanting "to make all proper applications, and use all proper endeavours, for the renewal of the leases," Renewals at the old rent, and increasing fines, till 1796; when the *sub-lessees*

fines; and stating that unless they were immediately paid the respondent would not renew. That would have been a sufficient demand under the act; and the agent then did, in point of fact, give notice that the respondent had been so advised by counsel. The deponent then stated the answer of the 17th July; that the appellant, R. Jackson, would write to his agent P. Jackson, and give directions to have the matter concluded; that he afterwards waited on the agent, who informed him that he had no instructions; that in August following he wrote to P. Jackson, stating, that as so much time had been lost relative to the renewals, he could not, without doing respondent injustice, avoid proceeding to prevent the appellant obtaining any renewal of the lease as the act prescribed, and entreating a speedy answer; that this produced no effect, and Saunders, the respondent, being pressed for money, in consequence of a decree against him in a suit with the Earl of Anglesey, the deponent went, on or about the 6th October 1800, to the house of the appellant, and personally demanded payment of the renewal fines from the appellant, having previously taken a warrant of attorney from respondent, authorizing him to make the demand; but neither payment nor any effect was produced by this step.

The demand by letter of July 9, was sufficient under the act.

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agreed to pay a greater proportion of the fine, on having an addition to their term, and clause introduced into the contract, that they should have the option to reject the renewal, in case the rent should be too much advanced. *Immediate lessee* endeavours to procure a renewal at a small fine and increasing rent; but the court below, on

of £300, as a fine for every such renewal; and also paying double the yearly rent, and no more, as shall be reserved and made payable to the said dean and chapter, and their successors, by the said J. Usher, &c. out of the hereby demised premises. And the said J. Davis, in like manner, for himself, his executors, administrators, and assigns, does covenant to and with the said J. Usher, his executors, administrators and assigns, that he the said J. Davis, his executors, administrators and assigns, on every subsequent grant, and after renewal and renewals, will pay to the said J. Usher, his executors, administrators and assigns, the said sum of £300 sterling, as a fine for such renewal or renewals for their said lease, and accepting of the said lease, within six calendar months after such renewals made with the dean and chapter, on their having notice thereof; and also pay to the said J. Usher, &c. *double the yearly rent* as shall be made payable to the said dean and chapter, and their successors, by the said dean and chapter, and their successors, by the said J. Usher, out of the hereby demised premises."

On a subsequent renewal the following stipulation was added to the covenant: *And it is hereby declared to be the true intent and meaning of the said parties to these presents, that in case the said &c. (sub-lessees,) their executors, administrators or assigns,*

Nothing effectual was done in October, November, or December, 1800; and in January, 1801, the respondent brought an ejectment to recover possession, the lives having dropped. The ejectment proceeded, and an application was made by the appellant to stay it, upon terms which were not acceded to; and judgment was obtained, and possession taken. The bill, which was filed in April, 1801, for the purpose of having the lease renewed, prayed that the respondent might be obliged to execute a renewal of the lease of the north-west part of Cumber, for the lives mentioned in a deed of renewal which had been prepared, but which Saunders had refused to execute.

Ejectment, Jan. 1801.

Bill for performance.

When this cause came on to be heard in Ireland, he had the honour to be Chancellor there; and it appeared to him that the object of the act was simply this: that no person should suffer through neglect merely; but that if a demand were made and not complied with in a reasonable time, it converted this into something more than mere neglect, and entitled the lessor to insist in equity that the interest of the lessee was gone; and the question was, what was a reasonable time? In this case it was clear, that though a formal demand was made on the 6th October, 1800, no effectual step was taken by the appellant to re-

No tenant to forfeit for neglect merely; but the demand and non-compliance in reasonable time converted this into more than mere neglect.

Reasonable time, what?

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shall upon any future renewal to be made by the dean and chapter, or their successors, of the said lands, to the said J. Usher, &c. apprehend that the reserved rent is too much advanced, it shall be at the election of the said, &c. (sub-lessees,) whether they will accept of a renewal, or refuse the same, and be content with and possess the residue and remainder of the term of years in their said lease then in being and unexpired."

In 1796, Usher, descendant of the original immediate lessee, (the dean and chapter having increased their fines,) called upon the sub-lessees to assist him with a sum in addition to the £300, in procuring a renewal, which they did, on the terms of having two years and an half added to their term; and renewals were thereupon executed, at the old rent, with covenants as in the original sub-lease, and the additional stipulation above stated. In 1801 Usher sold his interest in the lease to Hone, the appellant, for £950. Hone soon after applied to the agent of the dean and chapter, (Arthur Maguire,) to know on what terms they would renew; and being informed that a fine of £1035 8s. 9d. would be required, he caused a notice, dated July 20, 1802, to be served on the respondents, the sub-lessees, demanding, that they should pay the whole of the fine, and requiring a specific answer before the

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bill by the *sub-lessee*, decreed performance of the covenant, by renewal for a large fine at the old rent; the dean and chapter being willing to renew in that way; on the ground, apparently, that such was the true intent and meaning of the parties: it being conceived, that the option reserved to the *sub-lessees*, to reject the re-

In considering what is a reasonable time after demand, the previous transactions are to be taken into account.

new till after the ejectment had been brought. If no transactions had passed before between the parties, it might have been a different question. The proper construction of the act, as it appeared to him, was, that after demand the tenant should lose no time in taking the necessary steps to renew. But here he had, for two or three years, been told that it was incumbent on him to renew, and that he had all that time to prepare; and therefore the demand in October could have been no surprise on him, and he ought to have renewed immediately.

Some difficulty had arisen on this ground. In a conversation which took place, according to the agent Saunders' deposition, in March, 1799, Jackson the appellant, or his agent P. Jackson, on being asked when the appellant would be ready to pay the renewal fines, desired T. Saunders to prepare a renewal; and T. Saunders accordingly prepared a draft of a renewal for two lives, and before the end of the same month, (March, 1799,) as he believed, delivered it at the office of P. Jackson, St. Andrew-street, Dublin, for his approbation. It was doubtful when this draft was sent to P. Jackson, who gave rather an extraordinary account of it. His account of it was, that he first found it at his house, or office, in November, 1800; and then wrote

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newal, was intended to guard against the effect of an increasing rent, if insisted upon by the dean and chapter, without its being left to the *immediate lessee* to endeavour to procure a renewal at an increase of rent and small fine, if he could. This decision affirmed on appeal.

1st of the following September; promising in case of compliance with the proposition, to renew with them; otherwise, that he should consider himself at liberty to make the best terms he could with the dean and chapter, by renewing at an increased fine or rent, or suffering the term to expire. No answer having been given within the time, Hone represented to the agent, that the under tenants were refractory, and proposed to give £500 fine, and £80 additional rent, for renewal. The dean, on being informed of this proposal, desired the agent to communicate it to the under-tenants, that they might consider how their interest would be affected. They then, on December 2, 1802, gave notice to the appellant, that they were ready to advance the whole of the fine of £1035, in the mean time, to prevent the increasing of the rent; leaving it to be afterwards settled by arbitration what proportion should be paid by Hone. This not being attended to, they stated in a memorial to the dean and chapter, their liability to pay to the appellant double the rent which he paid, or might pay, to the dean and chapter. On the 30th, the respondents caused another notice to be served on the appellant, stating, "that the dean and chapter were ready to renew at the old rent, on payment of £1035 fine; that respondents were willing to pay the

upon it the words, "Received November 1, 1800," and he would have it inferred that it had not been left till then. It was singular that he did not inquire when it was left. This, it appeared, he had not done; but having seen it, as stated, he endorsed upon it the day on which he so found it. He (Lord Redesdale) did not however think it a matter of much consequence, even if it had not been left till that time; for he might have the next day filled up the blanks, and then the delay would have rested on Saunders. But instead of that, he, on finding it, merely noted the time, and took no steps upon it; and it struck him that it was wholly out of the question. An attempt was made upon this circumstance to impeach the testimony of T. Saunders, and this was said to be a new discovery: but upon looking at his notes he found that it had been much discussed below, and that Mr. Blackburne had strongly insisted upon it as a very important feature in the evidence; and the answer given to it was this, that T. Saunders might possibly have been incorrect as to the year 1799; but that it was clear the draft must have been prepared before the third life dropped, (July or August, 1800,) the draft being for two lives only.

Decided cases.

Reference had been made to cases decided before the

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whole, and to pay all future fines that might be demanded, leaving to the appellant his profit rent clear; that if he did not renew with the dean and chapter, and grant renewals to the respondents, on these terms, they would apply to a court of Equity for liberty to renew in his name." No satisfactory answer having been given, the respondents filed their bill in Chancery against Hone, and Maguire, the agent, (the object in making the latter a party being for the discovery of evidence;) stating as above, and praying that Hone might be compelled to renew, or that the plaintiffs might be authorized to renew in his name, under such terms as the court might think fit to direct. Hone having answered, and Maguires's name being struck out of the bill by leave, without putting him to the trouble of an answer, he having declared that he was ready to answer upon interrogatories, and several witnesses having been examined, the cause came on to be heard 5th March, 1804, before Lord Redesdale, (Chancellor,) who recommended an accommodation, but without effect. The cause came on to be heard 1st February, 1805, when the court *decreed*, "that the respondents should be at liberty to renew at their own expense; and that the appellants should do all necessary acts for that purpose; and that the renewal should be in Hone's name, if he consented

act; but he did not know that these were very material in a question respecting the construction of that act, because the object of the act was to obviate a supposed contradiction between the cases decided in Ireland and the decisions in this house.

The earliest case on the subject was said to be that of *Anderson* v. *Sweet*, *vide ante*, p. 8. That was a case of mere negligence in both parties. There were other cases, in some of which the renewals had been granted, in others refused. The case which first excited alarm was *Kane* v. *Hamilton*, *vide ante*, p. 60. That depended on very particular circumstances, which put neglect quite out of the question. Another case of this class, *Bateman* v. *Murray*, *vide ante*. p. 74, came to this house soon after, which appeared to him to have been clearly a case of fraud, and not of mere neglect; and nothing that was said by Lord Thurlow on that occasion could go to the extent of justifying the notion, that the court here had overlooked all the cases that had been decided in Ireland before. The manner in which Lord Thurlow stated it was, "that equity would relieve the lessee if he lost his right by *fraud in lessor*, *or by accident on his own part*, but would never assist him where he lost his right by his own *gross laches*, *or neglect*."

Church Leases.

Death of the late Dean pending the suit, and a larger fine demanded by his successor

in a month; otherwise, in the name of a trustee, to be named by plaintiffs and approved by the master; plaintiffs consenting to pay the whole fine and fees, and consenting, in case the renewal should be in the name of the defendant, to accept of covenants for renewal from him, with these variations, &c.; and reserving farther considerations.

The Master reported, "that the defendant had not consented that the lease should be renewed in his name; and that a trustee had been proposed and approved." the Dean of Christ's Church having died in the mean time, his successor demanded a fine of £4295, 4s. 8d. which plaintiffs paid, and a lease was executed to the trustee. Upon further directions, it was ordered and *decreed*, "that the trustee should execute new leases to plaintiffs, pursuant to the covenant in the former leases;" and the Master was directed "to inquire what portion of the fine ought to be considered as demanded in respect of the increased value of the lands produced by improvements beyond the ordinary expenditure of a tenant; and how much in respect of the lands exclusive of such improvements;" the sum of £300, to be deducted out of the latter part, and the plaintiffs to stand as creditors on defendant's interest in the lease for the remainder; and the renewed lease to remain vested in the trustee, to secure the same, unless the defendant

Whether these cases ought to have any influence in the construction of the act, he left it to their lordships to consider. The object was to prevent all future difficulty on this subject; and the act said, that in cases of simple neglect the tenant ought to be relieved. When after demand made, and not complied with in a reasonable time, the matter ceased to be mere neglect; and the act left it to the judge to say what was a reasonable time. It had been said that there ought to be some fixed rule as to the time: but a fixed rule as to the time would be mischievous in such cases. What might be a reasonable time in one case might not be so in another. In the present case, after repeated applications for two or three years, a formal demand was made on the 6th October, 1800, and no real steps were taken to renew and pay the fines till March 1801. Under these circumstances it had not appeared to him, that the tenant was entitled to a renewal. A demand had been made, and the tenant had neglected to comply within a reasonable time, and therefore was not entitled to relief under the act. It was material, on the dropping of a life, not only that the fine should be paid, but that another life should be nominated, otherwise the landlord might only have one fine, where if the tenant had complied with his covenant he might

The act left it to the judge to say in his discretion what is a reasonable time.

Any fixed rule as to the time would be mischievous. The question must depend on the particular circumstances of each case.

A life ought immediately to be nominated in

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paid in six months; the plaintiffs to pay the rents as they became due to the defendant, according to covenant; and to be at liberty, from time to time, to apply to the court for leave to renew the leases, and for that purpose to surrender to the trustee, &c.

March 7, 1806. The Master reported the payment of the fine by the plaintiffs; that the whole of it had been demanded in respect of the ordinary value of the lands; and that all rents were paid up to defendant. Upon petition by the defendant, the cause was reheard; when the Lord Chancellor (Ponsonby) decreed, that as the plaintiffs had offered to pay the sum required by the late Dean of Christ's Church, amounting to £1035, 8s. 9d., the decree of July 6, 1805, should be varied, so far as that the defendant's interest in the lease should stand as a security to the plaintiffs only for £3259, 15s. 11d. being the difference between £1035. 8s. 9d. and £4295, 4s. 8d.; and that in other respects the former decrees should be affirmed. From these decrees the defendant appealed.

Romilly and Hart (for appellant.) The lessor was bound to renew and to under lease; but he was left at liberty under the covenant as to the terms, whether by fine or increased rent. He was bound to pay all the fines above £300; and as ecclesiastical bodies were in the habit of taking fines on improvements, the perpetual

terms of the covenant, otherwise the landlord might lose several fines.

have received several fines; and it was material also, with a view to the keeping up the tenure, and enabling the landlord to proceed for the recovery of the rent. It would have been unjust therefore to have enabled the tenant, who after demand made, had not proceeded immediately to name the life and pay the fine, to compel a renewal. It would not be fitting for him to say more on the question here; but these were the reasons which influenced his mind in the court below, in deciding, that according to what seemed to him to be the sound construction of the act, the tenant, under all the circumstances, was not entitled to the relief which he claimed. This was a case of great consequence, as it affected so much of the landed property in Ireland; and it was very important that their lordships should draw the line between those who were to pay, and those who were to receive, and point out precisely what, under the law as it stood, were the respective duties of landlord and tenant in such cases.

Lord Eldon, (Chancellor.) In this case there had been two decrees, one of November 30, 1802, dismissing the bill with costs, the other of December 22, 1804, varying the former decree only by dismissing the bill without costs; and their lordships had heard stated to them the

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renewal on such terms would be ruin to him, unless he reserved the discretionary power to renew upon fines or increased rent. Without this option, equity must have said, that the nature and effect of the covenant never could have been understood by the parties, and would have set it aside, as in *Willan* v. *Willan*, 2 *Dow*. P. C. 274. The renewing at increased rents might be ruinous to the sublessees, had not an option been reserved to them to give up their interest when the rents should be too much advanced. The argument on the other side was, that the court was not to look at the terms of the instrument and covenant; but that the lessor (immediate lessee) must always renew on payment of fines, because that had been done hitherto. The court, however, must look at the covenant, and could not make a new agreement for the parties. The decrees below proceeded on a mistake as to the facts; for, as appellant understood plaintiffs, they had only offered to pay the fines in the mean time. But at at any rate appellant was not bound to accept the offer, as it rested with him to renew at an advanced rent, or on fines. The question was not what was just, but what was agreed upon between the parties; and the court could not make a new agreement for them. The subject involved three points; 1st, What was the construction of the covenant. The rule of equity was to consider what was the legal construction of the

grounds upon which these decrees proceeded. The difference between the appellant and respondent arose upon this state of facts (states the lease 1724, and reads the words of the covenants; states also the renewal in 1755, and dropping of two of the lives, one in 1789, the other in 1791, &c.) The appellant then represented, "that at the times when these lives dropped, he was, and ever since has been, very much embarrassed in his circumstances, in consequence of debts and incumbrances incurred by his father, which affected his said property, and by means of an expensive suit in which he was involved in the court of Chancery in Ireland, his endeavours to extricate himself from which engaged his attention." He solicited their lordships' attention to that passage, because he could not conceive that any equity could be founded on these embarrassments, unless the lessor had taken them into consideration, and created a new equity between the parties. The appellant then stated, "that in the month of Nov. 1800, the respondent, or his agent, furnished appellant's solicitor with a draft of a renewal for two lives; but that when appellant was preparing to have them engrossed, and to pay the fines, he was informed that the third life had dropped in the preceding August, and communicated this

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covenant, and then specifically to perform it. 2d. Whether this decree executed it according to the legal construction. 3d. Upon whom the loss which happened pending the suit ought to fall. As to the construction, the sub-lessee knew that the dean would naturally prefer the fines, and not allow the rent to be increased too much; and therefore he was contented to subject himself to the payment of the double rent, contributing only £300 to the fine, leaving the immediate lessee to deal as he could. It could not be the original intent that the immediate lessee should have only the stipulated profit rent, and forego all the advantages of improvements. The sub-lessee, by the contract of 1796, guarded against the too great increase of the rent, by stipulating that he should be at liberty to reject the renewal and exhaust the term. This construction was also corroborated by another part of that contract; for the sub-lessee, looking to the possibility of too great an increase of rent, had added two years and an half to his term. It was clear, then, that there was nothing to restrict a reasonable increase of rent. 2d. The decree did not execute the contract of the parties, but put a construction upon it which the terms and understanding of the parties did not warrant: or, in other words, made a new contract for them, which the court then executed. This

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to the respondent's solicitor, that the renewal might be made out for three lives." He then stated the steps that were taken to turn him out of possession, the tender made by him of fines and arrears on March 29, 1801; and at length he filed his bill, in the nature of a bill for the specific performance of this covenant, *vide ante*, to which he again called their lordships' attention (reads the covenant.) On the terms of this covenant the appellant insisted; 1st, That he was entitled to this renewal, strictly speaking, and that the real meaning of the covenant was, that if the tenant chose to renew on the dropping of the first or second life, he might do so; but that if he so chose, he might postpone it, and at any period, during the existence of the third life, call upon the landlord to renew for one or two lives, just before the expiration of the third life, and then at last pay the fines and nominate the lives. If the words of the covenant had that force, their lordships must so give it effect: but the tenant was bound to show that such was the meaning. He did not know how it might be in Ireland, but it would be difficult here to show that this could be the meaning, where the consequence of such a construction must be, that it would be in the option of the tenant, instead of nominating immediately on the dropping

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Richards and *Nolan* (for respondents.) The court did not make a new contract, but only executed the existing contract according to justice and the real intent and meaning of the parties. The leases having been septennially renewed upon fines for 150 years at the old rent, there was no difficulty in the construction of the covenant. In 1796 the parties erected a court of Equity for themselves. The sub-lessees, on account of the advance of the fines, agreed to pay more than the £300, which was in furtherance of the equitable intent of the old covenant. The price at which Hone purchased, clearly showed the impression upon the minds of the parties as to the true intent and meaning of the covenant. The intention of Hone was to put it in his power to destroy the interest of the sub-lessees, which it was the duty of the court to prevent, if the meaning of the covenant was, that

of any of the lives, and paying a fine, suppose at the end of every ten years, to defer the nomination till the third life was about to expire, till the end, suppose, of twenty, thirty, or forty years, and deprive the landlord of the additional fines, which, according to the casualities of human life, he might expect to have received in the course of so many years, if always on the dropping of one life another had been immediately nominated.

Contracts.

Relief in equity on compensation made.

Then it was said that the appellant was entitled to a renewal, even if the Tenantry Act had never passed, upon the equity of relieving against lapse of time, on full indemnity being made to the landlord. That was done in equity here in many cases; (in Ireland they had gone farther;) and they were now bound to proceed on the notion, that men were not, in all cases, to be held to their contracts, but that equity would relieve when the matter lay in compensation. Where the condition was for payment of money at a certain time, the time was not of the essence of contract; and this, it was said, was a matter which lay in compensation, and if interest should be allowed from the period when payment ought to have been made, this was considered as compensation, and equity would relieve notwithstanding the want of punctuality. Without entering

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both interests should be preserved. The meaning of the option reserved to the sub-lessees, to refuse to renew, was to guard against too great an advance of rent by the dean and chapter. The appellant refused to renew according to the true meaning of the covenant, and the consequences ought to fall upon him.

Decree of the court below affirmed.

Agent for appellant, *Bedford.* Agent for respondents, *Lane.* 2 *Dow.* P. C. 546.

A bill was brought into the House of Commons on the 2d April, 1829, for the purpose of altering the law in respect to *Ecclesiastical Leasings in Ireland*; the objects of which were explained to the House, in the following observations made by Mr. Stanley on the occasion of his introducing the bill.

Ecclesiastical Leasings (*Ireland.*)

Mr. Stanley said, that it would be in the remembrance of the House that he had brought a bill on this subject into Parliament during last session. His reason for doing so was that it might be printed, and that Hon. Gentlemen might have time to make themselves acquainted with its contents. As the practice

Imperfection of the principle of compensation as a ground of relief in equity.

at length into that subject, this must strike every one, that where the money, instead of being paid on an appointed day, was not paid till twelve months after, the consequence in many cases, might be little short of absolute ruin to the disappointed party. In these cases of leases renewable for ever Lord Thurlow had, at one time, persuaded himself that he never would compel a renewal. Where a man let his lands at what was a fair rent at the time, and covenanted to renew every seven years for ever, at exactly the same rent, Lord Thurlow thought that such a want of understanding of the nature and effect of the contract might be presumed, as to make it unfit for a court of Equity to interpose. It was like the horse and shoe nails contract mentioned in the books. But he found himself too much bound down by precedent to refuse; and it was true that equity here would compel the renewal, (though there was a great difference in this respect between this country and Ireland,) provided the lessee did his duty, and showed that he had done all that was obligatory on him.

In certain cases which had been referred to, great astonishment had been expressed at the length to which the courts in Ireland had gone, and the decisions followed which produced the Tenantry Act.

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existed at present, the bishops in Ireland were in the habit of granting leases for a term of twenty-one years; but instead of suffering them to run to that extent, they were usually taken back at the expiration of a year, and renewed, on the payment of a fine apportioned to the circumstances of the case. This practice, however, led to great inconvenience in some cases, and to great loss in others—a loss which not only affected the possessor of the bishopric, but even, by the exhaustion of the land, tended much to injure his successors. In many instances the holder of the farm refused, from caprice, or in the hopes of getting better terms by delay, to renew his lease; and it therefore frequently happened that the bishop, instead of receiving the real income arising from his see, was compelled to run his life against the lease of twenty-one years, which had to expire before he obtained the right of renewal. On the other hand, the tenant, finding no hopes of getting the land upon his own terms, probably wore out the land by exhausting crops, or neglected its proper cultivation, to the very great injury of the future interests of the bishop. It was not, however, upon the mere ground of loss, or injury, however great, that he (Mr. Stanley) rested his principal objection to the existing cause of settlement. There was something due to moral considera-

This led him to another point. The appellant contended that in case he were not entitled to a renewal under the terms of the covenant itself, or upon the common rules of equity, he had still a right to a specific performance under the effects of the Tenantry Act, which said, that mere neglect should not deprive the tenant of his right to renewal, but that if he paid his fines within a reasonable time after demand made, he should still have a renewal notwithstanding such previous neglect; but here he should leave off for the present.

The question considered with reference to the Tenantry Act, 19 and 20 Geo. 3. c. 30.

July 26. *Lord Eldon.* (Chancellor.) He had before stated to their lordships the three principal points contended for by the appellant: 1st, That till August 1800, the time when the third life dropped, he was entitled to a renewal according to the strict terms of the covenant. 2d. That he had a right to a renewal upon principles of equity, independant of the statute. 3d. That he was entitled to a renewal under the Tenantry Act, having tendered the renewal of fines within a reasonable time after demand made, supposing that demand to have been sufficiently formal and peremptory. He believed he had gone sufficiently far into the consideration of the reasonableness of a covenant with such a meaning to enable him to say, that a co-

Meaning of the covenant, if such as contended for by appellant,

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tions, and he conceived that the constant bargainings and bickerings upon the subjects of leases between the tenant and the bishop, tended much to the prejudice of religion, and to the degradation of the sacred character of a dignitary of the Church. He should therefore propose that a valuation be made, according to an estimate, of all the sums received during a period of twenty-one years, either in the shape of fines, or rent, or fees; and that there should be a second valuation of the utmost extent of the rack rent during the same period. This last valuation was to be taken, however, merely for the sake of subsequent reference. In the first place, then, he should propose, that according to the valuation of the fines, rent, and fees, through a period of twenty-one years, there should be a compulsion upon the tenant to take the lease for forty-one years at the same rent; and that in the next place the new rent should in the lease of forty-one years, bear the same proportion to the rack rent as the rent had borne according to the previous valuation in the old lease for twenty-one years to the then rack rent. This compulsion to abide by the terms of such a lease must operate on both parties, the bishop as well as the tenant; and he trusted by such means, to improve the condition of both, and to give a

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it would not be specifically executed.

venant would not be specifically executed by a court of Equity, if attended with the consequences which followed upon the construction contended by the appellant. That construction as already stated was, that the tenant was not called upon to renew, and pay a fine immediately on the dropping of any of the lives, but had the option to renew at any time during the existence of the third life, to postpone the renewal for 50 years, paying interest on the fines; whereas if on the dropping of each, the lives were always immediately nominated, 5, 6, 7, 8 or 10 lives might fall, and as many nominations take place in the course of these 50 years, and so many fines become payable to the landlord. That could not be the meaning of the covenant; or if it was, such a covenant was not one for specific execution in equity. As to the second point, that had been but faintly urged; and it appeared to him impossible to sustain it. And that reduced the question to this. Whether, under the Tenantry Act, relief ought to be given. The first life dropped in 1788, or 1789, the second in April 1791, and the third in August, 1800, and then there was a proposition to renew, which was not very seriously acted on till 1801. Here he should notice some general observations which had been made with a view to take the demand in this case out of the Tenantry Act. The first was that the demand ought to be for a specific sum. There was nothing in the act which said so. It must occur that the tenant would be most likely to know the time of the death of the life, and it was his business to come forward and make the proper tender; and if, at the time of a demand made, the

Tenantry Act, whether it afforded a ground of relief.

Demand. Whether it ought to be of a specific sum.

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greater security to the property of the See, as well as a greater certainty to the property of the tenant. The bill was in effect precisely the same as that which he had the honour to introduce last year, except that, in compliance with the suggestion of some Hon. Members, he had introduced some clauses, which, he agreed with them, would prove beneficial. One of those provided for the payment of all fines agreed to be paid at the time of the passing of the act. Another, that the bill should not affect existing leases upon bargains concluded between the bishop and the tenant; and a third (which was intended to prevent improper neglect of the lands,) that the power of making the valuation should be limited within a period of five years. With these provisions he hoped to effect all the improvements he contemplated in the condition of both parties, and he therefore begged leave to bring in the bill.

tenant himself did not happen to know what was the specific sum, the question then would be, what was a reasonable time for settling it.

What was a reasonable time: whether a time ought to be fixed by the courts.

Fine of redemption in foreclosure cases: the time there not fixed.

Another point contended was, that according to the act their lordships ought to say what, in every case, would be a reasonable time; as in foreclosure cases the Court of Chancery uniformly allowed six months for the mortgagor to redeem. That however, was a very different subject: but even there, though now it was the practice on account of its antiquity, rather than the reason of the thing, to allow six months, the court was in the habit, according to circumstances, the value of the subject, the probability of sale at a better price, &c. of enlarging the time; so that strictly speaking, even in these cases, it was not fixed what was to be held in all cases a reasonable time. Those who read this act, (19, 20, Geo. 3. c. 30,) the object of which was to teach the English courts what was the proper notion of Irish equity, must have known what was the practice of courts of equity there; and consequently, if any fixed time had been intended, they would not have legislated in general terms, but have expressly provided for a limited and regular time.

Mountnorris v. White, *vide post*.

Another consideration of great weight was this: he had before alluded to the surprise felt in this country at the extent to which the courts of equity in Ireland had carried the practice of giving relief in these cases of leases for lives with covenant for perpetual renewal; and it was certainly very extraordinary, that where a lessee covenanted to pay a fine in two, three, or four months, from the death of any of the lives, and where there was an express proviso, that if he did not then it should rest entirely on the option of the lessor, whether to renew or not, equity should relieve in a case of strong neglect in the tenant, and where the damage to the landlord was eventual and uncertain, and therefore not a proper subject of compensation. But to say that the act should be construed so as to apply to cases of this kind the same sort of rule as to time (six months) as had been applied to redemption in cases of mortgage, though the parties themselves had said that unless the lessee renewed in two, three, or four months, it should be at the option of the lessor to renew or not, appeared not only not the proper construction of the statute, but it was manifest that they who passed it had no such idea, and that six months was a time which the parties themselves thought unreasonable.

The rule as to the time in foreclosure not applicable.

Tenantry Act.

Then they came to the terms of the statute: "Whereas great part of the lands in this kingdom are held under leases for lives with covenants for perpetual renewal upon payment of certain fines, &c.; and whereas from various accidents and causes, tenants, and those deriving under them, have frequently *neglected* to pay or tender such fines within the times prescribed by such covenants after the fall of such lives respectively; and whereas many such leases are settled to make provision for families, &c. and whereas it has for a long time been a received opinion in this kingdom, to which some decisions in courts of equity, and declarations of judges, have given countenance, that courts of equity would relieve in such cases against lapse of time, *upon giving adequate compensation* to the persons to whom such fines were payable, or their representatives, to the end that such interests may not be defeated by *mere neglect*, &c. Be it enacted, &c. that courts of equity, *upon an adequate compensation being made*, shall relieve such tenants and their assigns against such lapse of time." He need not repeat what he had said respecting the extraordinary notion of equity as to what was compensation, but he should be very unwilling to apply in these cases the sort of rule which was adopted in cases of mortgage, when he considered that in six months the mortgagee might, for want of his money, be in the same gaol where otherwise his debtor would be. As to leases for lives renewable for ever, they, in England at least, found it very difficult to say what was adequate compensation; for in cases of leases for lives with a fine payable, and a new life to be nominated on the dropping of each life, and where on the dropping of a life another had not been nominated, it was impossible to know what was the value of the life that might have been nominated, and therefore impossible to ascertain the proper compensation. But if this doctrine had been acted upon in Ireland by a common error of law and equity, he did not say but it deserved great attention in cases of *mere neglect*. But in cases of fraud, such as the concealment of the time when a life was gone, or where the tenant was under a particular obligation with respect to the landlord by being employed as his agent, the question would be different. He did not call this a case of fraud, but he did not go to the length of saying that long neglect and supineness might not amount to a fraud: he gave no opinion on that point.

Compensation.

Then the act went on: "If no circumstance of fraud

be proved against such tenants, unless it be proved to the satisfaction of such courts that the landlords, or lessors, or persons entitled to receive such fines, had *demanded* such fines from such tenants or their assigns, and that the same had been refused or *neglected* to be paid *within a reasonable time after such demand.*" In this case there was no difficulty as to whether the person who made the demand was authorized to receive the fines; but, even if the question had arisen, he would think, that though a person had no express power for that particular purpose, but was employed to collect the landlord's revenue generally, and therefore to collect his fines, he had still sufficient authority. And as to the alleged necessity that the demand should be in writing, there was no such thing in the act, and that would not have been left out of the act if any such thing had been intended. Here there was certainly authority enough to make the demand, and a parole demand was sufficient. It was impossible to read this act without seeing the necessity of holding the balance with an even hand between the landlord and tenant. A life drops, and a fine is due; but the tenant holds for two other lives, and as long as either of these lasted, though the tenant rested without paying the fines, the landlord could not get possession; and till the tenant filed a bill for the specific performance of the covenant to renew, the landlord could not shew the demand, and might not be able to get the benefit of the act, unless he filed a bill to perpetuate testimony, to meet the tenant when he came for a specific performance.

Demand.

A special authority to demand and receive the fines not necessary.

Not necessary that the demand should be in writing.

Importance with reference to the Tenantry Act, of holding the balance even as between landlord and tenant.

It had been said that some time must be fixed, as that which should be considered as a reasonable time. But what was or was not a reasonable time must depend on the circumstances of each separate case. It had also been pressed, that a subsequent demand was a waver of a previous demand. He could not, however, so readily accede to that doctrine. It might or might not be a waver, and whether it ought so to be considered or not must depend on the nature of the demand. But it was impossible, as he thought, to contest this, that after applications without effect from year to year, when they came to look at what was a reasonable time, the same time which would be reasonable after a demand made in the first year, might not be reasonable upon a demand made at the close of two or three years' neglect, and ineffectual applications. If in this case the tenant, after having so often been applied to with-

What was a reasonable time must depend on the circumstances of each particular case.

Waver. A subsequent demand, not a waver of prior demands, unless the terms of the subsequent demand are complied with.

In considering what is a reasonable time

after demand, previous applications and neglect are to be taken into account.

out effect, had at the time of the demand in October urged his embarrassed circumstances, the landlord might say, "I have nothing to do with your circumstances: I tell you, that if you now pay your fines, and nominate a life, or lives, (which was material,) I shall still renew, but then there must be no farther delay." Could it be said that the landlord waved therefore the previous demands? He waved them indeed if there were no farther delay, but that there should be no farther delay was the very term and condition of the waver.

Then in the fair and reasonable construction of this act, looking at all the evidence and all the circumstances, had or had not the tenant been put in mind that he had neglected to pay fines that were due? had not a demand been made? and had there not been a refusal or neglect, for a longer period than could be called a reasonable time? had there been more than a reasonable time? That was a question of fact. He (Lord Chancellor) said, that applications had been repeatedly made, and not complied with in a reasonable time; that the right to insist upon the previous demands had been waved in October, provided there was no farther delay; that there was farther delay, and a delay for a time which in itself was unreasonable, even if there had been no neglect before. A reasonable construction must be put on the act, for the benefit of the tenant; but not such a construction as would leave the landlord without any adequate remedy, and enable the tenant to make of his covenant just what he pleased. *Vide ante p.* 164.

Judgment.

Decree accordingly affirmed.

Agent for appellant, *Lane*; agent for respondent, *Fladgate*, 2. *Dow*. P. C. 437.

Observations on the Appeal Case of Jackson v. *Saunders.*

The observations of the Editor on this case are not varied by the appeal in this case: for these observations *vide ante, p.* 178.

The next case is:

Earl of Mountnorris, Appellant,
White, Respondent.

July, 6, 8, 27. 1814.

Where, on the dropping of one of the lives, in a lease for three lives with covenant for perpetual renewal, repeated applications were made to the tenant to renew according to his covenant, particularly in 1788, and 1796, and he made no offer to renew till 1804 or 1805, when some conversation took place respecting a renewal upon the tenant's relinquishing a suit in equity, which he was carrying on against his landlord, but which conversation ended without any thing being done, and the landlord refused to renew; the House of Lords, reversing a decision of the Irish court of Exchequer, held that the tenant's right to a renewal was forfeited, and that the case was not one where relief could be granted under the Tenantry Act.

This cause arose upon a bill filed in the court of Exchequer, Feb. 11, 1806, in the nature of a bill for specific performance of a covenant for renewal in two leases for three lives renewable for ever.

The leases were granted in 1747, of certain lands, Killish and others, in the county of Wexford, by the Earl of Anglesey, (represented by the appellant,) to one Fielding, son-in-law of James White, (represented by the respondent,) who was the Earl of Anglesey's agent, manager, and receiver, to whom Fielding, being only a trustee for White, soon after assigned his interest. In this lease it was covenanted that "if it should happen on the failure of any life therein nominated, or to be nominated, that the tenant should not pay to the Earl of Anglesey, for every life so failing, the sum of £8 for one part of the lands, and £12 for the other part, by way of fines, and nominate another life within twelve calendar months after the death of such life, it should be lawful for the Earl of Anglesey, his heirs and assigns, to refuse to renew at his or their option." The interest in one of these leases was acquired from Hawtry White, son of James White, by the respondent, Hawtry's nephew, in 1788, and interest in the other leases in 1804.

One of the lives dropped in 1784; and various applications were made to Hawtry White, and to the respondent, after his interest in the lands was known, to renew. The times and nature of these applications were set forth in the evidence of Sir Frederick Flood, the appellant's friend and agent; and Mr. Morton, respondent's solicitor. Sir F. Flood stated, that in 1788 Hawtry White came to Camolin Park, the seat of Lord Mountnorris, to pay some arrears of rent, and on that occasion deponent and appellant applied for the fines; and that the answer by Hawtry White was "that he thought he had done a great deal in bringing in so large a sum for rents, which he was obliged to borrow, and that he could do no more at that time." In or about 1796 he made another application to Hawtry White, in the grand jury room at Wexford, saying, that he did not wish that any advantage should be taken of his laches, *if he renewed without delay*. He after-

Sentientibus Lords Eldon and Redesdale, that relief under the Act is to be confined to cases of simple demand (without any menace of forfeiture, &c.) followed by neglect for an unreasonable time, which is sufficient to exclude the tenant, and bar his relief; that, where there have been several demands, if the terms of the last demand are not complied with, the original demand remains the foundation of the right; that inability to pay is no excuse; that the character of a general agent is sufficient to authorise one to demand and receive the fines; and that if there had been a consent to wave the forfeiture connected with the relinquishing the suit, the transaction would have been a new agreement within the statute of fraud.

Dubitante Lord Eldon, whether if there had been a waver of the right connected with another

wards applied to respondent, to renew for the premises held by him, and desired him to speak to his uncle to do the same; that before and since he had sent repeated messages to Hawtry, to the same effect, being induced to it the more, from appellant's pressing occasion for money at that time, and particularly that he sent a message in 1803 or 1804, by a confidential servant of Hawtry White's, which the servant delivered, but without effect. In 1796, relying on the respondent's promises to renew, he caused a calculation of the fines, &c. to be made, having been assured by the respondent that the life dropped in 1786, whereas it had in fact dropped at a much earlier period. Sir F. Flood then gave an account of an application to him by respondent, for a renewal, early in 1805; and that an offer was made to relinquish a lawsuit, carried on against appellant by one Dubois, and by respondent, in consideration of renewal; but that Sir F. Flood referred him to Lord Mountnorris himself, who was soon expected from England; that upon his lordship's arrival some conversation took place on the subject of renewal, all connected with the settling of Dubois's suit, but that at length intimation was given in April, 1805, that the appellant would not renew after such gross lapses and neglect.

The effect of Morton's evidence was, that upon these applications by the respondent for renewal (the first of the them, as he stated, at the close of 1804) both Sir Frederick Flood and the appellant had at first agreed to renew, but afterwards refused. Nothing was said about Dubois' suit in his presence, but he was not present at the whole of the conversation.

In Jan. 1806 the appellant filed a bill to perpetuate the testimony of his witnesses. On Feb. 11, 1806, the respondent filed his bill for renewal; and in 1808 the court decreed a specific performance of the covenant for renewal, on payment of rent, renewal fines, septennial fines, and interest.

From this decree Lord Mountnorris appealed.

Romilly and ——— for appellant; *Hart* and *Bell* for respondent.

Lord Redesdale.—This was an appeal from a decision of the court of Exchequer, in Ireland, under the following circumstances, [states them, and particularly the covenant by which, upon failure of renewal within a limited time, it was to be optional with the landlord whether to renew or not.] This latter clause distinguished the present case

from that which had the other day been under consideration by their lordships. It was a very strong clause, and if there had not been determined cases in favour of renewal, notwithstanding such negative clauses, it would be extremely difficult to get over it; for it allowed twelve months to the tenant to provide and pay the fines; and there was an express provision that, in case the tenant did not pay, the landlord should not be compelled to renew. But in looking at the cases determined in Ireland, it would be found that the courts there had given relief in cases where there was such express negative clauses. This case must therefore depend on the construction of the Irish Tenantry Act.

transaction, it was competent to take one part of the bargain, and act upon it as if the other part had been out of the question: also, whether when the landlord acquired a right to the forfeiture, the agent could pass from it without a special authority. *Semble* that, in these cases, equity in Ireland relieves against the strongest negative clauses in the contract. Covenant in the leases, that on failure to renew in twelve months after the death of a life in the leases, it should be at the option of the landlord to renew or not. Tenants relieved against the express stipulation of the contract.

The circumstances of the case were singular, and there appeared to have been neglect, to a very considerable extent. It appeared from the evidence of Sir F. Flood, who was the person intrusted with the management of the appellant's affairs in Ireland, in the appellant's absence, that "in 1788 he was present when Hawtry White came to Camolin Park to pay certain arrears of rent, and was asked for his fines, to which he answered, *that he thought he had done a great deal, &c. and could do no more at that time;*" and it had been represented that the appellant submitted to that excuse. The next transaction was in the grand jury room at Wexford, in 1796, where Sir Frederick Flood asked why H. White did not pay his fines, adding that he did not wish any advantage to be taken, in case there were no farther delay. Here then was an express intimation, that there had been delay from 1788 to 1796; of which Sir F. Flood conceived the appellant had a right to take advantage, but thought it might be waved provided there were no further delay. The evidence on this point was clear and uncontroverted. The impression on Sir F. Flood's mind then was, that the demand of 1788 was sufficient. [His lordship then adverted to the rest of Sir F. Flood's evidence, the general effect of which has been before set forth.] It was material to attend to the deposition of Sir F. Flood, as he considered every thing as connected with Dubois' suit, and that if there was any chance of an agreement to renew at all, the settling of that suit must be part of the transaction. On the part of the respondent, it had been contended that these conversations amounted to a waver of the right to insist on the previous demands; and the question was, whether they did so or not. One thing was material, which had not been dwelt

Demand in 1788 and 1796.

If the alleged consent to renew after forfeiture was connected with Dubois' suit, it was a new agreement within the statute of frauds.

upon at the bar, though the counsel's attention had been called to it by him. If what Sir F. Flood said was true, that the transaction was connected with Dubois' suit, it was a new agreement within the statute of fraud. He did not think it necessary however to consider that question, as Morton in no degree fairly contradicted Sir F. Flood's account of the conversation with the respondent White, in 1804, or 1805: though they differed a little as to the time, and Sir F. Flood might be mistaken in that, as Morton spoke from his books. Sir F. Flood connected this with Dubois' suit. Morton was silent as to the suit, but he did not say that he had stated all that passed, so that they might be reconciled. [His lordship proceeded farther to comment on the evidence: the result on the whole being, that all the subsequent conversations about renewal were connected with the settlement of Dubois' suit; and that Lord Mountnorris, having refused to come to any agreement even on these terms without good advice, at length determined not to renew at all, and filed a bill to perpetuate the testimony of his witnesses.]

Demand in 1788 sufficient.

Then it appeared, that in 1788 there was a demand sufficient to put him on his guard, and to apprize him that it was incumbent on him to proceed to renew, (for he ought to have known the time of the death of the *cestui que vie*, his father,) and that there was a dereliction of renewal till 1796: and that Sir F. Flood then understood that he was not entitled to a renewal; and yet all this was to be set aside by the evidence of Morton, intended to show that there was a waver, and consent to renew! It did then appear to him infinitely too much to say here that the demand was waved.

The demand need not be accompanied with a threat not to renew if not complied with.

Relief to the tenant under the Tenantry Act to be given only in cases of simple innocent neglect.

They were told, that in the court below it was considered that the demand must be expressed to be for the the purpose of concluding the tenant under the act, in case he neglected or refused to renew. There was no such thing in the statute; and it was not an opinion which he was inclined to hold. But here it was clear that Flood conceived the demand of 1788 to be such as he could take advantage of. It did appear to him, then, that this did not come within the equity of the Tenantry Act, which he considered as clearly applicable only to cases of simple innocent neglect, and not to cases where a demand was made, and not complied with in a reasonable time. Here there was a demand in 1788; and it could not be argued with effect, that because the appellant demanded for the tenth

time what was his right, that he thereby forfeited the benefit of the nine first demands; for that was the amount of it. If a person, after several previous demands, made another, and the last demand was instantly complied with, that would raise a different question. But it was impossible by a subsequent, to destroy the effect of an original demand. Unless the subsequent demand was immediately complied with, the original demand was that upon which the right was founded.

Where there had been several demands, and the last not complied with, the original demand remained the foundation of the right.

Lord Eldon, (Chancellor.) He concurred in the last observation. It appeared to him that the court below had conceived, that if a new demand were made, it was a waver of former demands. It was impossible to say that such must necessarily be the effect of the new demand. That must depend upon its nature. Suppose a landlord were to say, "I made a demand a long time ago, and more than a reasonable time has elapsed without compliance on your part; I now again demand payment; and if you pay immediately, I shall not take advantage of your refusal or neglect." Suppose then the tenant did not pay immediately, was he to be allowed to turn round and say, "your new demand is to be considered as a waver of your previous demands, though the terms of it have not been complied with, and though you protested against its being so considered." It was impossible to sustain any such doctrine. He had before been of opinion that it was impossible to sustain it; but in these Irish cases, it was a great happiness to him, and must add much to the weight of their lordships' decisions, to have the benefit of the assistance of his noble friend Lord Redesdale.

Waver.

How it ever happened that equity came to interpose in cases of this kind, he could not conceive; but now it was said, that if a life dropped and a fine was to be paid, and another life was to be nominated within 12 months after, and it had been so agreed between the parties, equity would relieve the tenant, though no fine was paid nor life nominated till the end, suppose, of three years; because they said, that the time for renewal was not of the essence of the contract, and compensation might be made to the landlord, but he maintained that it baffled all calculation to say exactly what was compensation, when the tenant neither paid, nor nominated a life, till the end of three years, when he ought to have paid at the end of one year, and then nominated a life; and when, if he had so done

Difficult to conceive how equity came to interpose in the face of express covenant.

Compensation.

according to his contract, he might, at the end of three years, be compellable to pay another fine, and nominate another life. The courts, however, had gone the length of throwing all the error of the calculation on the landlord, and relieving the lessee. But here the landlord had said, that he would not trust to the ordinary doctrines and rules of equity. "I do not choose," he said, "that any court on earth should decide me; and I expressly declare, that unless my tenant performs his covenant, he shall have no renewal, unless it be my will and pleasure to renew." Why, to interfere in such a case, what was it but saying, that persons could not be bound by a contract out of the rules of the courts? He had been very much disinclined to think that this could have been supported by authority; but he saw there was authority; and therefore he agreed, that the election reserved by the landlord was of more avail than if there had been no such clause in the leases.

They had in Ireland stretched their equity in favour of their tenants to an extent of which there was here no example. The hardships of some decisions by the House of Lords in this country had been complained of, and so this act was passed. He wished it had been better considered; but there it was, and they must deal with it as they best could. The act said, "Whereas from various causes and accidents, tenants neglected to pay," &c. Why look at Sir F. Flood's evidence: he said, that when White came to pay his rent, and was asked for his fines, the answer was, "that he thought he had done a great deal in bringing so much money for rents, which he had been obliged to borrow; and that he could do no more at that time." Why did the legislature mean that this representation of inability to pay was one of the accidents and causes to be relieved against? Then the act went on: "That courts of equity, on an adequate compensation being made," (it was impossible to calculate the compensation,) "shall relieve such tenants and assigns against such lapse of time, if no circumstance of fraud be proved against such tenants; unless it be proved to the satisfaction of such courts, that the landlords or lessors, or persons entitled to receive such fines, had demanded" (in writing would have been said, if it had been so meant) "such fines from such tenants, or their assigns, and that the same had been refused or neglected to be paid within a reasonable time after such demand." In the first place, when they came to consider the various accidents and

Tenantry Act.

Inability to pay not one of the various accidents and causes of neglect to be relieved against under the Tenantry Act.

causes of neglect, against which it was intended to relieve? Certainly some such idea had been entertained in Ireland. A man stated his circumstances as an excuse for non-payment. But if, after demand, there was neglect, meaning thereby a want of due diligence; or refusal to pay, did the act say that the cause signified one farthing?

If after demand there is delay for an unreasonable time, the cause of the delay is no excuse.

Now here it appeared that a life had dropped in 1784, which White had represented as having dropped in 1786; and it was difficult to believe that he should be so little attentive to the time of his father's death, as not to know whether he died in 1784 or 1786. But though it might be a fraud to conceal in this manner the death of a life, his opinion did not at all turn upon that point. This, however, was clear, that he must have known that when a life dropped, it was his duty within 12 months after, to pay a fine, and nominate another life. But that was not done; and when in 1788, three or four years after the life dropped, and whether three years or twenty-three was as to this purpose the same, he was asked for his fines; he answered, "that he though the had done a great deal, &c., and could do no more at that time." But the counsel had said, there must not only be a demand, but the demand must be made in a minacious manner. "You must not only demand your fines, but you must threaten, that unless they are paid in a reasonable time, you will refuse to renew." But when the Statute said, "unless it be proved that the landlord, lessor, or person entitled to receive them, had *demanded* such fines," &c. the demand must, *prima facie*, be taken to be for the purpose of asserting the right; and it was on others to shew that, in order to be by law effectual, it must be made in a particular manner, and under particular circumstances. Then Sir F. Flood stated, that his next application, (and his character of general agent was sufficient authority,) "after that of 1788, was in a grand jury room at Wexford, some years ago; thinks about 12 or 14 years ago; when he asked White why he did not pay the fines." Now here was a notable law on their construction; this was merely to awaken the tenant. "Don't forget you owe me a fine;" that was all according to this doctrine; and a reasonable time after was 14 years! "But that though the said Hawtry had been hostile in his conduct and acts against the appellant, yet for deponent's part, he wished that no legal advantage should be taken, *if he, White, would use no farther delay.*" Now if it was not necessary that the demand should be in writing, he would ask, whether this was

Concealment of the time when a life dropped.

Demand.

The character of a general agent sufficient authority to demand and receive fines.

not sufficiently *minacious* : "that no legal advantage should be taken if he, White, used no farther delay? Why, did not that, in common sense and common parlance, mean, " If you do use farther delay, legal advantage shall be taken?" and was the plea of the want of money to be admitted against this? though of all the various accidents and causes of neglect, want of money in England, Ireland, and Scotland, was the chief. Another passage which escaped the counsel's attention was material: that he had before and since sent repeated messages, &c. to Hawtry to pay his fines, and informed him of the appellant's great want of money." This added great weight to the demands which were proved. If Lord Mountnorris then acquired the right of refusal to renew, he doubted whether it was competent to Sir F. Flood to pass from it: but here it was unnecessary to consider that question, as it appeared that Sir F. Flood took care to disavow all consent to renew without the personal concurrence of Lord Mountnorris, to whom he referred the respondent.

When the appellant acquired the right of refusal to renew, doubtful if his agent could pass from it.

Waver.

Then it was said, that there was a waver of the right. He had often had reason to lament how easily the provisions of that wise statute, the statute of frauds, might be evaded. But he admitted (a new agreement was a different thing) that Lord Mountnorris might say, "the various causes and accidents are all reduced to your want of money. I am in great want of money also; and if you pay immediately, I shall renew." He had a right to do so: but admitting that to be the law, he must have clear fact upon which to administer that law, and the matter must not be left in *dubio* by conflicting evidence. It appeared that the parties had other matters to settle, and the fines and whole matters were to be settled together. Here then was a case of quite a different character from one where there was only the mere fact of a waver; for if other interests were in question, and formed part of the bargain, he doubted whether the Court of Exchequer could separate the one part from the other, and pick out that portion which consisted the waver. But it did not seem necessary even to decide that. It appeared quite enough that there was a demand before Lord Mountnorris returned to Ireland; that a reasonable, and more than a reasonable time, from the period of that demand had elapsed, before any thing was done. When he did return, the treaty of arrangement included other matters; and nothing was said which could be considered as amounting to waver,

unless the whole of the arrangement had taken place. He was happy to find that his noble friend Lord Redesdale, who was so well acquainted with Irish customs and Irish proceedings, concurred with him in the opinion, that this claim for renewal could not be supported under the Tenantry Act. But he protested that unless they could decide so as not to relieve tenants from all control in these cases, so as not to give to *gross neglect* and refusal the character of *mere neglect*, it would be hardly possible to say with certainty what was the law as between landlord and tenant in that country; and the landed property there would be put into such a state, that no one could know how long he might be landlord, or what might be his duty as a tenant.

Lord Redesdale. In 1717 a case of renewal had been determined in Ireland, *Anderson* v. *Sweet*, (*ante, p.* 8,) which came here some time after. That was a case of mere neglect, and the decision was affirmed. There was another the same year, *Charles* v. *Rowley*, which was dismissed for *laches*. In several cases which followed, the prejudice began to run in favour of renewal, and the Tenantry Act was passed. Then came the case of *Magrath* v. *Muskerry*, (*ante* p. 116,) where the bill was dismissed for gross neglect on the part of the tenant. Therefore, neither among the cases which had been determined here while the appellate jurisdiction was excercised by this house, nor among those determined in Ireland after the appellate jurisdiction returned to the House of Lords there, was there any case in which relief was given where there appeared gross, wilful, and obstinate neglect.

No case in which relief had been given where there was gross, &c. neglect.

Decree *reversed.*

Judgment.

Agents for the appellant, *Williams and Brooks.* Agent for the respondent, *Fladgate.* 2 *Dow.* P. C. 459.

Observations on the Case of Mountnorris (*Earl of*) v. *White.*

In this case the House of Lords reversed the decree of the Irish Exchequer; the point on which their lordships differed with that court was, whether a waver of the demand under the statute arose upon the facts of this case. The Exchequer thought it did; and the House of Lords that it did not. It would seem from the report that the Court of Exchequer in Ireland had adopted the opinion, that of the different demands made in this case, the subsequent counteracted the preceding ones; and that they thus neutralized each other; whereas the lords considered them

Waver, was the point of difference, between the House of Lords and Court of Exchequer.

as cumulative, and co-operative; the latter deriving strength from, and giving strength to, the preceding ones. Finally, that it was impossible, by a subsequent demand, to destroy the effect of an original demand; and that unless the subsequent demand was immediately complied with, the original demand remained in force; and was in these cases the foundation of the right to the forfeiture.

It seems also from the report, that Lord Redesdale understood the Court of Exchequer as having considered that the demand under the Tenantry Act must be expressed to be for the purpose of concluding the tenant, in case he neglected or refused to renew: his lordship declined to concur in this opinion with the Exchequer, the differences, however, between the two courts, as appearing on this report, are expressed, particularly in the latter instance rather too generally; and certainly, so far as the Court of Exchequer is concerned, bear no marks of that peculiar clearness of expression and distinctness of phrase with which that court has been accustomed to convey its opinions, whether they be right, or otherwise.

This appeal case, with the Irish judgment which it reverses, adds another, to many other instances occurring in this treatise tending to shew, that on the subject of renewals under this tenure in Ireland, the law authorities in England adopt a construction more favourable to the right of the landlord, whilst these in Ireland adopt a construction more favourable to the right of the tenant. In fact Lord Eldon would pronounce a forfeiture to the landlord in a case where the Exchequer of Ireland would decree a renewal to the tenant.

Lord Eldon, whilst he expresses his non-concurrence with the principle, admits and recognises the existence of an equity on this subject peculiar to Ireland; his words are, "they had in Ireland stretched their equity in favour of these tenants to an extent of which there was here no example; the hardship of some decisions by the House of Lords in this country had been complained of, and so this act was passed; he wished it had been better considered." His lordship adds, "how it ever happened that equity ever came to interpose in cases of this kind he could not conceive; but now it was said, that if a life dropped, and a fine was to be paid, and another life to be nominated in 12 months after; and it had been so agreed between the parties, equity would relieve the tenant, though no fine was paid, nor life nominated till the end, suppose of three years; because

Difficulties suggested by Lord Eldon in respect to Irish renewals.

they said, that the time for renewal was not of the essence of the contract, and compensation might be made to the landlord. But he maintained that it baffled all calculation to say exactly what was compensation, when the tenant neither paid, nor nominated a life, till the end of three years, when he ought to have paid at the end of one year, and then nominated a life; and when, if he had so done according to his contract, he might at the end of three years be compelled to pay another fine, and nominate another life."

Attempt to answer these difficulties.

There can be no doubt of the soundness of these objections as suggested by Lord Eldon, according to all the principles of *English* equity; and but for the peculiarity of this tenure, and *Irish* equity, these objections would be unanswerable; for here is a covenant by the tenant, that he shall pay the fine within a year, and that if he fail so to do, the landlord shall not be compellable to renew: yet the tenant calls upon his landlord to renew after having declined such payments for many years, and calls upon a Court of Equity to enforce that renewal in the face of his own broken contract. This is one strong difficulty, perhaps an insurmountable one, to a mind acquainted only with the equity of England. But another, and a stronger objection remains; namely, the difficulty of granting compensation for the consequences of such breach of covenant, in cases where it is so difficult, if not impossible, to calculate such consequences, or measure such compensation; and wherein sometimes compensation *must be* impossible: for instance, where the fine becomes due to the tenant for life, and is not demanded or paid until the remainder takes effect, and is then paid to the remainder man: in such case it is clearly impossible the compensation can ever be made to him to whom the fines became payable.

The Editor has now put the difficulties suggested by Lord Eldon, as conjoined with other circumstances which must add to their weight, because he deems it right that the student of law in Ireland should be enabled to meet this argument in the strongest way in which it can be put; if it can be met at all.

The Editor apprehends that an answer to this argument may be found through the previous parts of this treatise. This country, on the occasion of introducing these leases, was impoverished, distracted, and disturbed, by the operation and consequences of its various confiscations, and the doubtful titles which thence resulted; every thing

was unsettled, either by law or through force; property, nay personal safety were insecure, and therefore some extraordinary motive was necessary to create and encourage the growth of a respectable tenantry in a country so unfavourably circumstanced. The *bonus* to attract a tenantry of this description must in former times have been considerable; the motive to the landlord was great, namely, to plant a respectable and improving tenantry, as so many insulated portions of agricultural example through a distracted and impoverished district, *vide ante*, p. 15, 16, and 17. As the motive to the landlord was great, (somewhat similar, as it would be at the present day, to induce a number of respectable tenants to settle themselves under some considerable owner of the fee, in some of our distant colonies), the owner of the fee in Ireland was compelled to make the *bonus* to such tenantry, in correspondence to such motive, and in fact to make the tenant a *quasi* partner with the landlord in the substantial enjoyment of the interest; that is, in some respect, to divide with the tenant, not the fee, exactly, because the landlord held the fee, but a substantial share in the value of the fee, so far as the frame of our laws would permit. There were other reasons for thus dividing with the tenantry, the more valuable portion of the inheritance, resulting from the penal laws in Ireland; and also for the reasons assigned by Lord Redesdale in the last part of the case next following.

For these reasons, or such reasons, this description of tenure was introduced into this country, through the circumstances and necessities of the country; and thence arose the peculiar tenure in Ireland of a perpetual freehold. England, happily unaccustomed to this state of things, at least in modern times, was freed from the necessity which produced this tenure in Ireland. The tenure in the latter country was, however, created and continues, and laws and judges must deal with it as a great statistical and political fact, created by necessity, and its consequences continuing by necessity, on the principle of "public benefit." "*Atque ipsa utilitas, justi prope mater et æqui.*"

This foundation of property being thus created, other property was embarked upon it; marriage settlements were made; money lent; and various incumbrances incurred on this foundation. A mass of property so created, put forth of necessity a special title to protection from our courts of equity, and received, and have long enjoyed that protection. Our courts of equity considered this lease as a promise by

the landlord to make a lease of a perpetual freehold to the tenant. "I promise to make you a freehold for ever," was certainly the promise which the original lessor in Ireland intended; and in that sense courts of equity have considered it; and considering it in this way, explains the whole difficulty. This sort of engagement is entirely unknown to the laws of England; perhaps because the lord of the fee in England was never placed under circumstances as to induce him to admit his tenant into such a participation in the substantial value of the inheritance; and therefore the laws of England are unaccustomed to the maxims of equity which could arise on such a state of things. But that state of things did exist in Ireland, and the law was compelled to view it accordingly; and therefore *our* courts determined to consider the landlord as a person who had promised to his tenant a freehold for ever. And although a pepper-corn, or a small nominal fine (for the amount of the fine will not alter the argument) might have been agreed upon on the drop of each life, yet it was considered that such fine was not of the essence or substantial part of the contract, because that was to make a freehold for ever, and the fines were but the steps to effectuate that object: probably the landlord might, in the first instance, have got some considerable fine, or reserved an adequate rent; but in any view of the case, when he said to his tenant, "You have omitted to pay such, or such fines," it was always in the mouth of of the tenant to reply, "I have under your hand and seal, or that of your predecessor, the recorded promise of a freehold lease for ever: on the faith of this security much property has been embarked on these lands, great improvements effected, and important incumbrances incurred: and I can appeal to the usual equity of this country, that this property, now so considerable and so inconsiderable when I or my predecessor first obtained it, should not now be forfeited back to the representative of a remote lessor for the non-payment of the fine, which may sometimes be large, but generally is small; and which, if a pepper-corn would be as strong a reason in law for the forfeiting of this interest as of any other fine; more especially where I offer full compensation for any losses which the landlord may have incurred by the non-payment of these fines."

It was, therefore, not without reason, that the judicial authorities in Ireland adopted the principle of renewing in the face of these negative clauses, and of compelling the landlord to keep the substance of his promise to the te-

nant, of giving him a freehold for ever, although the tenant might have neglected the performance of a comparatively unimportant and collateral duty, provided he repaired such laches. They considered the non-payment of the fine as collateral, and immaterial as to the time of their payment to the general substance of the contract; inasmuch as the only materiality of the fine consisted in its being a preservative of the tenure, or a symbol whereby the acknowledgment of the tenant's allegiance was to be expressed to the lord of the fee; which expression of allegiance was material in order to show the quarter in which the fee rested, and in order to hinder the fee itself from falling in upon the tenant, which would be the case under a presumption of law, from long possession, if this recognition to the contrary did not periodically occur: therefore the payment of the fine, if but a pepper-corn or a shilling, was material, as the homage of the tenant to the lord of the fee, and material for this particular purpose; but although its *payment* was thus material, the *time* of that payment was not. And therefore the judges of Ireland considered that that *time*, being a circumstance thus collateral, should not be considered as an equivalent to turn back the substantial current of an ancient contract, always understood by the parties, and dealt with by the public as a contract to grant a perpetuity. They considered that to cut off such perpetuity, because the payment of such small, or nominal fine, or pepper-corn, had been *delayed*, would be under the circumstances of this country, a sacrifice of substance to these formalities; for the pepper-corn is a usual fine in those cases, and many of the pecuniary fines are little more valuable, and the right of forfeiture would be as strong in one case as the other; and the forfeiture of estates would thus be effected through an unreasonable deference to those forms erected for quite different purposes; which when they operate to other purposes than their own, always operate injury and mischief, and may be not inaptly considered, as the *infelix lollium*; the *steriles avenæ*, which obstruct and impede the avenues of justice. The pepper-corn, in such cases, would be "as the tares which sprung up and choked the corn."

But, says Lord Eldon, this principle of relieving against such negative covenants, even although its propriety should be conceded, cannot be acted upon according to any of the rules of equity, unless compensation can be made for the laches to the person injured thereby. And

in respect to the non-payment of those fines on the drops of those lives, the compensation cannot be made, because the calculation is impossible, inasmuch as no one can calculate the number of lives which might have dropped if the strict substitution had regularly taken place. The answer to this is: Are there such things as septennial fines? And what are they? And why were they created? Were they not created to meet this very objection? And by an eminent chief judge, and an Englishman. And have they not been now in regular operation for more than a century, with the concurrence of the first equity authorities in both countries? And has not Lord Eldon himself, on every Irish case, where compensation became necessary, decreed it on a calculation, according to this established measure? Is it impossible to calculate on the duration of human life; of course it is to do so with a prophetic accuracy; but surely to do so on the principle of a reasonable average, suited to the ordinary transactions of life, makes a part of the general business of mankind: such an average on the duration of human life, namely, of seven years, has been long since adopted by the legislature; and in the construction of these septennial fines, was borrowed from the statute book by Chief Baron Gilbert. This last objection of Lord Eldon, is met, and answered, by the first case in this treatise (*Anderson* v. *Sweet.*) From the multiplicity of business with which a Chancellor of England is, more than any other man, overpowered, in the variety of his avocations, from his court, to the council; thence to the appeals; and thence to the woolsack; perhaps to follow up the avocations of a laborious day by the more difficult avocations of a laborious night, with the same round to commence the following morning; it is more difficult to conceive that a man like Lord Eldon, on whom such duties had devolved for five-and-twenty years, should have come forth from their exercise, with strength and intellect, so vigorous and unimpaired, than that he should have omitted the consideration of a maxim of comparatively provincial law. It is not unreasonable to suppose that the sole purpose of septennial fines, and the cases by which they are sanctioned and created, may have escaped him amidst the multitudinous variety of his duties. And it may be allowable in the Editor to say, consistently with the greatest respect for that eminent judge, that his objection in respect to compensation, was met and obviated by Chief Baron Gilbert in the case of *Anderson* v. *Sweet*, upwards of an hundred

years ago, and in a manner which ever since has met the sanction of the first law authorities in both countries. In addition to these observations, the operation of the statute comes in, empowering the landlord to put an end at his pleasure to the tenant's equity, unless he pays up his fines. A circumstance which the Editor apprehends might satisfy the difficulties of English lawyers, under their apprehensions that the rights of the landlord are imperfectly protected by the laws of Ireland. The Editor entertains a very different opinion; the laws of Ireland before the Union, were made by the landlords of Ireland; and no one acquainted with these laws will accuse the landlords of not protecting their interests. It appears in this case, that Lord Eldon congratulated the House of Lords and himself, on the useful circumstances of having the aid of his noble friend Lord Redesdale on this subject of Irish equity, with which he was so peculiarly informed. The Editor is of opinion, that the landholders and law professions of Ireland, who certainly must concur in the compliment to Lord Redesdale, may also feel satisfaction at the fortunate circumstance of his presence on that occasion; for had he been absent, it is difficult to conceive how the Lords could have found their way to the principle of our *Irish* equity, controlled as they must have been by the views of Lord Eldon, so characteristic of the sound principles of the *equity of England.*

Such circumstances have occasionally led the Editor to lament that there were not more law lords conversant with Irish equity, placed under circumstances that might enable them to attend the hearing of Irish appeals in the House of Lords.

Considerations on this subject * have been already sug-

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* The Master of the Rolls has a seat in the House of Lords next to that of the Lord Chief Justice, on what is called the second woolsack; but has no right to speak or vote. The situation of Lord Plunket, like that of Lord Gifford, superadding a peerage to the Mastership of the Rolls, would have given an importance to that situation which it seldom possessed, there having been no Master of the Rolls sitting in parliament, as a peer of the realm, at any time before the reign of George III., nor ever before except in two cases; the distinction to Lord Plunket was therefore extraordinary, and his talents as a law lord would have made it an eminent situation, and a powerful accession to the tribunal on Irish ap-

gested to the public on the occasion of Lord Plunket resigning the situation of Master of the Rolls in England.

The next case is:

Barrett, Appellant,

Burke, Respondent.

26th Feb. 5th March, 1817.

Lease in 1713 for three lives, renewable for ever on payment of a fine on the dropping of each life, at £50 rent, by A. to B. B. leases the lands to C. at £100 rent, with covenant to renew for ever to C. on the same terms; and B. also covenants to renew regularly with A.

By indenture dated 23d December, 1713, the Hon. Edward Brabazon being seised in fee of certain lands, those of Garrylish and others, in the county of Tipperary, demised the same to John Marshall, of Clonmel, for three lives of the Brabazon family, at £50, with a covenant for perpetual renewal, upon the request, and at the expense, of the lessee, within twelve months after the expiration of any of the lives then inserted, or thereafter to be inserted, upon payment of a fine of £25 for each new life added. Robert Marshall, the son of John, having become entitled, he agreed to execute a lease of the lands to one Terence Magrath, and then assigned his remaining interest to William Nash, whose nephew and representative, James Nash, afterwards specifically performed the agreement with Magrath, by executing a lease of the lands to Milo Burke, the

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peals. There is no judicial character more wanted in conducting the jurisprudence of the United Kingdom than a "law lord," who, to the rank of a peer of parliament, would unite the station of a high Equity Judge, and also the accidental advantage of being well acquainted with the peculiar equity of Ireland. This combination of qualifications so necessary would have been exemplified in Lord Plunket in an eminent degree. The Appeal Court in the House of Lords, from the decrees of the Equity Courts in Ireland, will always require to be assisted by such a character in such a situation. Lord Eldon had much experience in Irish Appeals, which supplied him with knowledge of the peculiar equity of Ireland; but his removal from the woolsack, and his age, terminate or must soon terminate his functions in that department. Lord Redesdale had a still greater advantage over Lord Eldon, because he superadded to the knowledge of an English equity lawyer, the experience of an Irish Equity Judge; on him alone the decisions of that court of appeal seem now entirely to devolve—a weight which, if possible, never should be cast on the shoulders of an individual now fast sinking in the wane of life; indeed it is a disadvantage that the decrees of the two highest equity courts of Ireland should be

C. pays his fines and renews with B., but B. never renews with A. A representative of A. in 1793, accepts some money from C. towards the discharge of the fines due from B., and makes demands for payment of the whole of the fines by C. which C. neglects to comply with.

A formal demand of the fines made by a representative of A. in 1799, against C., who does nothing for nine months after demand, and then makes an illusory tender, which is not accepted.

respondent's ancestor, who had become entitled to the benefit of that agreement. The indenture, dated 9th January, 1761, after reciting the death of the *cestui que vies* on the original lease, and the nomination of a new life, (that of Burke's son,) witnessed, that in pursuance of the agreement, and in consideration of a £25 fine, then paid on the insertion of the new life, Nash demised the lands to Burke for three lives, with covenant for perpetual renewal, at a rent of £102 10s. Burke covenanted, within six months after the expiration of any of the lives, to name another life; and pay the fine; and Nash covenanted, in three months after a life so nominated and fine paid, to renew with the head landlord at Burke's expense. The indenture contained a proviso that, in case Burke neglected to nominate a life within six months, Nash should be at liberty to nominate to the head landlord any life he might think proper: and Burke covenanted to pay interest to Nash on any of the fines that might be advanced by Nash to the original lessee before payment by Burke to Nash. The last of the *cestui que vies* in the original lease died in 1772, and, in point of fact, the lease never was renewed with the the head landlord.

The appellant became entitled to the lands as head landlord in 1799, by demise from Edward Brabazon: and having been unable to discover the representatives of Nash,

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liable to reversal from a single opinion whose fallibility must be every day increasing. Lord Plunket would have brought to this situation two advantages greater than either, perhaps than both of the two last-mentioned judicial lords; he would have increased the strength as well as multiplied the survivorship of this practical tribunal in the House of Lords, and of course have widened the opportunity of supplying hereafter judicial successors to those vacancies so likely to occur; but Lord Plunket is not so placed, and Lord Eldon is in a great measure displaced from that tribunal; and Lord Redesdale cannot in course long fill that situation, and is not particularly bound to its duties by any appointment or obligation more than that of any young lord of Parliament who took the oaths during the last session. Therefore, as the non-appointment of Lord Plunket to the Chancellorship of Ireland has been a great loss to Ireland, so his retirement from the Mastership of the Rolls in England has been a great loss to both countries; and his translation from thence to the Common Pleas of Ireland, is not only a great loss and injury to himself, but a considerable loss and injury to the empire at large.

he by advice of counsel, calculated the renewal fines up to the 25th Feb. 1801, and executed a power of attorney to one Dowling, authorizing him to demand and receive the fines. On the 27th Feb. 1801, Dowling, accompanied by the appellant, went to the lands, and there a formal demand of the fines was made from the principal occupier, and also from the other occupying tenants; and a notice of the demand was then also served by Dowling on the several tenants, including Milo Burke, the respondent's father, who was then in possession; and a copy of the calculation of the renewal fines was also served on Burke. The appellant caused a notice of the demand to be published in the Dublin and London Gazettes on the 5th March, 1801, which was continued for two months from that time. On the 24th March, 1801, M. Burke furnished the appellant with an account of money paid by him from 1774 to 1799, to the Brabazons, from which it appeared that Burke had paid considerably more than his own rent; and he alleged that the excess was paid on account of renewal fines. Burke however took no step towards settling the account till the 27th November, 1801, on which day he made what was called a tender of the fines, taking credit for the sum alleged to have been paid by him to the Brabazons beyond his own rent. The tender consisted of eight notes of the Bank of Ireland, two notes of Messrs. Finlay and Co., and seven bills of exchange accepted by several persons in trade in Dublin, some of which bills were then over due, and in the hands of the holder, dishonoured. When Burke made this tender he was accompanied by his law agent, Mr. E. Kirby, who had been agent for E. Brabazon, the devisor of the appellant. The appellant took a memorandum of the particulars of each note and bill, and of the dates of the bills, and asked Burke whether he had any more to say, and Burke answered that he had not.

In M. T. 1801, the appellant brought an ejectment against Burke; and on the 4th December, 1801, Burke filed his bill in the court of Exchequer, stating, that in 1780 W. Brabazon, then the head landlord, had agreed to accept Nash's profit rent in discharge of the arrears of the head rent and renewal fines; and that from 1782 the head and profit rents had been regularly paid; and *that in* 1793 *E. Brabazon, the son of William, had distinctly agreed to accept of this mode of payment*, so that the forfeiture was waived; and praying that the appellant, or the heir at law of E. Brabazon, might be decreed to execute to Burke,

Held, by the House of Lords, that under these circumstances C. had no claim in equity to a renewal.

Per Lord Redesdale. A formal demand is not necessary under the Tenantry Act. The true meaning of the Tenantry Act is to declare what was the equity of Ireland, with respect to these leases, before the statute.

When a demand is made, the neglect to pay, when it goes beyond what is a reasonable time for payment, ceases to be mere neglect and becomes wilful. What is a reasonable time for payment must depend on circumstances, and no precise time applicable to all cases can with justice be fixed.

Though a formal demand is not necessary, yet, when such a demand is made, the prior demands are waived, and the time is to be computed from the period of the formal demand: but prior demands are to

be taken into account in considering what is a reasonable time after the formal demand. When the first lessee receives the fines from his under-tenant, and neglects to pay them to the head landlord, that is fraud in the first lessee, who is therefore not entitled to a renewal, and the remedy of the under-tenant is against the first lessee, and not against the head landlord. The landlord, in making the demand, is not bound to state the precise sum due, nor to make a demand upon, or give notice to, every individual interested in the subject. The original design of these leases was the better cultivation of inferior lands and the more easy recovery of the rent, &c.

as trustee for the heir or representative of Nash, a renewal of the original lease, and for an account and injunction. To this bill none of the Nashes were parties. The appellant in his answer insisted that there had been such laches and neglect on the part of the Nashes, and those deriving under them, as amounted to gross fraud, and that the right of renewal was forfeited, particularly by the lapse of ten months from the time of demand and notice, without any attempt to pay the fines, except the illusory tender in 1801.

Burke then in July, 1802, filed an amended bill, making the representatives of Nash, parties, in which it was stated, that by an agreement in writing, executed in 1782, Nash consented to assign his profit rent to W. Brabazon until the arrears of the head rent should be discharged: a statement differing from that made in the original bill, inasmuch as it was not alleged in the amended bill that, in the agreement with W. Brabazon, any thing was said respecting the renewal fines. The consent of E. Brabazon in 1793, to accept the profit rent in discharge both of arrears of head rent, and renewal fines, was stated as before; and the prayer was the same as in the original bill. Answers having been put in, and the cause revived by the respondent on the death of his father, issue was joined and witnesses examined.

The only *evidence* material to be noticed for the present purpose is that of the law agent for the plaintiff, Mr. E. Kirby, who had been the law agent of E. Brabazon relative to the transaction of 1793. He stated, that in consequence of letters written by him, at the desire of E. Brabazon, to M. Burke, requiring Burke to settle an account of arrears of rent due from the Nashes, a meeting took place in May, 1793, between Burke and Brabazon, at which he, Kirby, was present; and it then appeared that all arrears of rent had been paid up to Nov. 1792, with an over payment of £100; that E. Brabazon said, "he would allow the over payment out of the renewal fines due by the Nashes to him for the lands, whereupon deponent did then communicate to Burke that said Edward would expect immediate payment of all renewal fines due to him from the Nash family, and that renewals should be at once taken out, or words to that effect; to which the said Milo replied, that his father had paid up all renewal fines due by said Burke to the Nash family, and obtained regular renewals of said premises, and that said Burke had then a renewal executed by J. Nash, for three lives, all of whom he alleged were then living; and saith, said Burke

did then produce to said Edward and to deponent a deed or instrument engrossed on paper, purporting to be a renewal of said lands, executed by said Nash, wherein said M. Burke, W. Burke, and John Burke, said Milo's father and brother, as deponent believes, appeared to be the lives named therein; and believes the said William and John were then and still are living. Saith, on the production of said deed or renewal, said Edward expressed much displeasure that the Nash family should receive the renewal fines from said Burke, their under-tenant, and execute renewals without paying his, said Edward's family or himself, their renewal fines, though the renewal fines payable by Burke, on the fall of each life, to said Nashes, was same as was payable by the Nashes under their lease. Saith, said Burke, under apparent distress of mind, informed said Edward, that he had a family of eight or ten children, and that he would be ruined if the said Edward would seek to enforce from him payment of the renewal fines, then appearing due to him; upon which said Edward, with strong expression of feeling and kind disposition towards said Burke, declared he would not take advantage of him, and that for the present he would not proceed for payment of said fines; *whereupon deponent or said Edward, desired said Burke should, as soon as he could, endeavour to make up the amount of the renewal fines, for that he, Mr. Brabazon, would not pay any compliment to the Nash family.* And that deponent did then ask said Edward, whether, as all arrears of rent were then paid up, deponent should continue to receive from said Burke the profit rent of £52 10s. a year, arising out of said lands, to said Nashes, which said Edward desired deponent to do, saying, he would allow such payments out of the renewal fines." And then, after adverting to some matters of account, he proceeded thus: "Saith, that prior to May, 1793, deponent believes he got instructions from said E. Brabazon to demand or enforce renewal fines from the Nash family; in consequence whereof deponent did, as he verily believes, apply to M. Burke, deceased, and also to Mary Nash, the widow of James Nash, for payment thereof. Saith, that from 1st May, 1793, till within a month of said Edward's death, as deponent best recollects, said Edward never did, to this deponent's knowledge, direct deponent to take proceedings to evict the interest in the lands in the pleadings mentioned, in case said renewal fines were not paid; but saith that in the latter end of November, or beginning of December,

1799, said Edward, in conversation, told deponent that he wanted a new coach; in answer to which, deponent told him he could easily get one; to which said Edward replied, that he would not go in debt for a coach, but that he would insist on Burke's paying as much on account of the renewal fines as would purchase one, otherwise, that he would insist on payment of the entire, or evict the lease, or words to that effect. And saith, deponent did, immediately after such conversation, write to the said M. Burke, unless he did then, without delay, remit two hundred guineas, as he best recollects and believes, on account of the fines due for said lands to deponent, deponent would discontinue to receive Nash's profit rent; but saith said Burke did not remit one shilling more than his usual payments of the head rent, and some part of Nash's profit rent." And, in his cross-examination, the witness made the following statement with respect to renewal fines: "Saith, that prior to the month of May, 1793, deponent was directed by E. Brabazon, deceased, either to apply for, or enforce the payment of the renewal fines and arrears of rent, if any arrears were due, on the lands in the pleadings mentioned, from the Nash family and said Milo; saith, he recollects to have received such instructions subsequent to 1st November, 1799, but does not recollect to have received any such instructions in the interval between May, 1793, and November, 1799; does not recollect that any person was present when he received such instructions or directions; believes he answered on both such occasions that he would do as he was so directed; saith, that it was in consequence of deponent's application to M. Burke, according to the first direction he received from E. Brabazon on the subject, that a meeting took place on the 1st of May, 1792, between said Edward and Milo at Tara, where an account was stated of the payments made by said Milo, on account of the rents of the lands in the pleadings mentioned; saith, deponent hath no recollection, nor does he believe *that said Edward, on any occasion, complained to deponent, or in his presence, that no proceedings had been taken* for the recovery of the said rent or fines, or made any complaint of that or a similar nature to deponent's knowledge or belief."

The amount of this evidence, as understood in the House of Lords, was, that E. Brabazon had accepted some money, part of the profit rent, on account of the renewal fines, but that he had not agreed that the whole should be

gradually liquidated by payment to him of the profit rent, and that he had on the contrary insisted upon payment of the fines in a different mode, but without effect. The court below, however, seems to have been of opinion that if E. Brabazon accepted from Burke any part of the profit rent on account of the fines, he thereby bound himself to accept the whole in that mode of payment, and had waived the forfeiture; and that the cause hinged upon the point whether E. Brabazon had not thus accepted money from Burke; and the court tendered an issue to the defendant (appellant, Barret,) to try that question, which issue Barrett declined to accept; and the court seems therefore to have decided as if the question had been tried, and the verdict had been against him. The *decree* was as follows: "That the appellant having declined to accept an issue to try and inquire whether E. Brabazon, in the pleadings mentioned, did at any time, and when, receive any and what sums of money out of the lands comprised in the lease of 23d December, 1713, for or on account of the renewal or septennial fines due under said lease; that it appears to the court, that W. Brabazon, in the pleadings mentioned, and the said E. Brabazon, were respectively in receipt of the rent of £102 10s. a year, in pleadings mentioned, from the 10th December, 1782, to the 30th December, 1799, first in discharge of the rent and arrears of rent due to them, and next in and towards satisfaction of the renewal and septennial fines, and the interest thereon; therefore let the officer inquire and report the amount of all sums so received by the said W. and E. Brabazon out of the said lands, during the period aforesaid, and let him apply the same as received, first in discharge of rent and receiver's fees, and arrears of rent due, and then in discharge of the renewal and septennial fines and interest thereon; and let him strike a balance on the foot of such fines, septennial fines, and interests, on 27th Feb. 1801; and in taking such accounts of fines, and septennial fines, and interest, (the parties admitting that Brabazon Ponsonby, Earl of Besborough, died on the 15th July, 1758, and that Chadworth Brabazon, Earl of Meath, died 14th May, 1763, and that Edward Brabazon, Earl of Meath, died 22d Nov., 1772; and it appearing that the said tenant has twelve months time to nominate a new life in the place and stead of any life named in said lease of the 23d Dec. 1713, that should happen to fall, and so from time to time upon all subsequent renewals,) let the officer charge one

Issue.

fine of £25, with interest from the 15th July, 1759, and another fine, of £25, with interest from the 14th May, 1764, and another fine of £25 with interest from the 22d November, 1773; and so, at the end of every eight years from the then periods last-mentioned, let him charge additional fines of £25, each with interest; and let the officer distinguish and report how much of the balance which will appear to be due for renewal and septennial fines, and interest thereon, upon the said 27th of February, 1801, according to the directions aforesaid, is composed of renewal and septennial fines which became payable to the said Earl of Meath, the lessor, during his life-time, with interest for the same, and how much thereof is composed of renewal and septennial fines which became due in the time of W. Brabazon during his life-time, with interest for the same, and how much thereof is composed of fines which became payable to the said E. Brabazon during his life-time, with interest for the same, and how much thereof is composed of fines due to the defendant, Roger Barrett (the appellant,) in his own right, as the devisee of the said Edward, and reserve all equity between the parties, and all further directions until the return of the report."

The officer having made his report, a *final decree* was pronounced on the 24th June, 1812, whereby the appellant was ordered to execute a renewal of the lease to Mary Nash, widow, and Richard Harold, the surviving trustee named in the will of James Nash, deceased, &c. From these Barrett *appealed.*

Sir S. Romilly and *Mr. Roupell*, for the appellant; *Mr. Hart* and *Mr. Wetherall*, for the respondent.

Lord Eldon (Chancellor.) In this case the court of Exchequer pronounced a decree reciting, "That Barrett having declined to accept an issue to try and inquire whether E. Brabazon, in the pleadings mentioned, did at any time and when receive any and what sums of money out of the lands comprised in the lease of 23d December, 1713, for or on account of the renewal or septennial fines due under the said lease, &c." and afterwards, a decree was pronounced, giving Burke the benefit of the act usually called the Tenantry Act. The court below, therefore, proceeded on this issue as an essential part of the case; and they seem to have thought that, as the appellant had declined to accept it, the case was to be taken as if the issue had been tried and found against him; and on that ground they gave relief. On looking at the bill and the answer, and at the evidence of Kirby, and considering with whom

Ground of decision below, that Barrett had declined to accept an issue to try whether E. Brabazon had received

he was connected at the time of the latter part of these proceedings, and with whom he had been before connected; and considering the evidence altogether, and the whole circumstances of the case, I am of opinion that no such issue ought to have been directed; and if I rightly understand the Tenantry Act, though that issue had been tried and found against the appellant, it would not have been conclusive against him.

any payments on account of renewal fines.

Looking at the Tenantry Act only, I cannot in that view of the case consider this as a case of mere neglect; and it would be mischievous not to distinguish between cases of mere neglect, and cases of wilful neglect. The tenant was in possession, and knew the *cestui que vies;* and he transacts with his immediate landlord, paying him the fines, while no care was taken to pay what was due to the original lessor. In this case also a demand was made, and not acceded to; and it cannot be considered as a case of mere neglect.

That issue ought not to be directed, and though it had been found against the appellant, it would not have been conclusive against him.

This not a case of mere neglect.

Demand made and not complied with.

I have stated the grounds of my opinion very shortly, because the reasons and principles on which it is founded will probably be stated and explained at large, and much better, by a noble lord who presided for some time in the court of Chancery in Ireland.

Lord Redesdale. I am clearly of opinion that the decrees ought to be reversed. The issue had no tendency to decide the case. The issue was "whether E. Brabazon, in the pleadings mentioned, did, at any time and when, receive any and what sums of money out of the lands comprised in the lease of 23d December, 1713, for or on account of the renewal or septennial fines due under the said lease." That was a question which would not decide the case; for though some sums had been paid to E. Brabazon on account of the fines, that would not decide whether there was such neglect on the part of the tenant, as ought to deprive him of the benefit of renewal. The issue has not been proposed according to the case contended for on the part of the respondent, that is, a case of *contract*, and that, such being the *agreement* entered into between him and Brabazon, the representatives of Brabazon were bound to renew according to that agreement. That has been contended on the part of the respondent. The issue however is not of that description, but one which has no tendency to decide the case.

The issue not decisive of the case, for though some sums might have been paid to E. Brabazon onaccount of the fines, there might still have been wilful neglect on the part of the tenant.

But it is clear from Kirby's evidence that there was no such agreement. The evidence amounted only to this, that

The real nature and effect of

the transaction of 1793.

E. Brabazon consents to apply what he received beyond the arrears of the head rent towards the discharge of what was due to him on account of the fines. But there was no contract that he would not call for the fines in any other manner; and it appears from Kirby's evidence, that he did in fact call for the fines in another manner: so that the ground on which the court of Exchequer proceeded is not a just ground. The only question is, whether the tenant, having clearly lost his legal right, ought to have the relief which, by the practice of the courts of Equity in Ireland, was given, before the Tenantry Act was passed; for the true meaning of the Tenantry Act is to declare what was the equity of Ireland before the statute. It is merely a declaratory act. The act itself recites what was the practice of the courts of Equity in Ireland before it passed. When the case was one of simple neglect it was relieveable. Where the case went beyond simple neglect, it was not the practice in equity to relieve.

The Tenantry Act. It is a declaratory act, declaring what was the equity of Ireland before it passed. Demand, neglect, reasonable.

In my humble opinion, and I have frequently had occasion to consider this act, the meaning of it is, that the moment a demand is made, the neglect, when it goes beyond what is a reasonable time for payment, ceases to be mere neglect, and becomes wilful. Lord Claré had the same view of the meaning of the act, "Reasonable time," he says, (*Freeman* v. *Boyle*, *ante* 152,) "within the act shall be deemed only that time which is necessary to give the tenant full opportunity for ascertaining when the *cestui que vies* died, for computing the amount of the fines due, and for preparing the leases. The precise time cannot be defined." That I take to be the true meaning of the act; and it must depend upon the particular circumstance of each case, whether the tenant has applied for renewal within the proper time. It has been contended that some precise time ought to be fixed. But the circumstances are so various that it would be doing great injustice to the tenants to fix any precise time. Every case is different in its circumstances, and a singular circumstance in the present case is, that the only person who had the means of making up the account is agent for the lessee, and had been agent for the lessor; and he had in his possession all the documents necessary for the purpose of making up the account, and he might have done it in a short time. In the case of *Jackson* v. *Saunders*, *ante*, I was of opinion, and that opinion was confirmed by the decision of this House, that four months, or from four to five months, was, under the circumstances, an unreasonable time; and the circumstances then were, the frequently calling for the fines before a for-

No precise time for renewing after demand can be fixed. What is a reasonable time must depend on the circumstances of each case.

mal demand made. In looking at the act, it does not appear that any *formal* demand is necesssary; but the party having made it, the time is to be computed from the period of that demand: and the prior demands are waved by the subsequent formal demand if the fines are paid within a reasonable time after demand. But then I think, it is to be considered what former demands were made with reference to the point of neglect, and the question what is a reasonable time after the formal demand.

A formal demand not necessary; but when made, the time is to be computed from the period of that demand. But prior demands to be taken into account in considering what is a reasonable time after a formal demand.

In this case it appears from the evidence of Kirby, who stood in the singular situation which I have mentioned, that demands were made several years before, and that on Burke's representing that he had paid the fines to the Nashes, E. Brabazon consented to give some indulgence to Burke, and to receive the profit rent; and then Kirby states, "whereupon the deponent or the said Edward Brabazon desired that the said Burke should, as soon as he could, endeavour to make up the amount of the renewal fines; for that he, Mr. Brabazon, *would not pay any compliment to the Nash family.* Brabazon had given the indulgence merely out of compassion to Burke, Nash having received the fines from Burke without paying to Brabazon what he had so received, which was a fraud on the part of Nash; so that it comes to the ground on which Lord Thurlow rested in the case of Lady Ross, (*Bateman* v. *Murray*, *ante*, 74,) which was misunderstood by Lord Lifford, and which, by the by, produced the Tenantry Act. The ground on which that case was decided, and which was misunderstood by Lord Lifford, was, that the agent for Lady Ross had called upon the other lessees to pay their fines, and he himself had not paid them, though the lives had dropped, which was a fraud. So here it was a fraud in Nash, the receiving the fines from his own under-tenant, without paying them over to Brabazon. It is clear then that the Nash family would not be entitled to renewal at their own suit, and yet this decree gives it them at the suit of Burke.

Nash receives the fines from his under-tenant and does not pay them to his landlord: this is fraud in Nash, and the Nashes have no good claim to a renewal.

All therefore we have to inquire into is, whether Burke was guilty of wilful neglect after the demand was made. The first demand was made in 1792, and no such arrangement as that contended for took place with respect to the profit rent. That appears by Kirby's evidence. Then the profit rent continues, however, to be received, and no further demand is made till shortly before the death of E. Brabazon, when, as Kirby states, Brabazon said that he wanted a new coach, and would insist on Burke's paying as much, on account of the renewal fines, as would pur-

State of the case as to Burke.

Prior demands.

chase one, otherwise that he would enforce payment of the entire: and then Kirby wrote to Burke that, unless he did then without delay remit two hundred guineas, on account of the fines due for the lands, Brabazon would discontinue to receive the profit rent. But Kirby says, that the money was not paid. The words are, "saith, said Burke did not remit one shilling more than his usual payment of the head rent, and some part of Nash's profit rent;" so that he did not even remit the whole of Nash's profit rent. This was in 1799. After the death of E. Brabazon, Barrett, who became entitled, insisted upon payment, and made a *formal demand*, with notice. It was contended that Barrett ought to have settled the precise sum that was due. But the act does not impose any such duty on the landlord; and it would be great injustice if it did, as he is not likely to be the most cognizant of the lives and deaths, the *cestui que vies* being usually named by the lessees from among their own families, and they are bound by the original obligation to tender the sum due. The lessor often cannot know who the lives are, as they are generally persons of the family of the lessee, and unconnected with the lessor. It is sufficient for the purposes of this act that a demand has been made; and the tenant is to be judged by this question, was it mere neglect or wilful neglect in him that he did not pay the fines? If it were wilful neglect, he is not entitled to a renewal. That is the construction put upon the act by Lord Clare; and Lord Clare knew the views of the legislature when the act was passed. I am therefore clearly of opinion that a simple demand is all that is necessary on the part of the lessor. A contrary construction would make property of this kind almost of no value to the lessors. A lease is made for three lives; one of the lives drops: the lessor demands payment of the fine; the lessee does not pay; two of the lives still remain, and the lessor cannot recover the property. How is he then to keep alive the memory of the notice and demand? He can do so only by a bill to perpetuate the testimony of witnesses, the expense of which he must pay. But this difficulty is, in fact, imposed on the landlord; and if, in addition to this, he were bound to state the precise sum due when he made the demand, an estate of this kind would be worth nothing. It has been contended that the demand ought to be made upon, and notice given to, all who are interested. I know a property of 13,000 acres in the county of Tipperary, which is covered with leases of this description, divided and subdivided by under leases, five

The landlord in making the demand, is not bound to state the precise sum due.

A simple demand is all that is necessary on the part of the lessor.

or six deep; and the owner has no conception of all who are interested. All he knows is who is to pay him the head rent and the fines of renewal. The demand however, according to the construction contended for, must extend to lessees of every description. But when the act speaks of assignees, it means assignees of the whole interest: and this still leaves a difficulty where the whole interest is divided into a great many parts; the effect of which often is to make the interest of the lessor of such small value as to be scarcely saleable in the market. Your lordships, under these circumstances, will not extend the meaning and benefit of the act beyond cases of mere neglect; and the demand is one circumstance by which wilful neglect is to be established.

Assignees means, of the whole interest.

In this case a demand, though not a formal one, was made in 1799. On the death of E. Brabazon, a formal demand was made. What took place? Burke suffered nine months to pass without doing any thing: and what does he do then? He comes with Kirby and makes a tender; and besides other objections, it was not sufficient in amount. But could Kirby really have believed that Barrett would have accepted such bills as these? It was merely a delusive pretence, and not a real tender. What Barrett did, was to make a memorandum of the particulars of each note and bill tendered, and cause it to be subscribed by a person present. What passed then? Barrett said, "Burke, have you any more to say?" and was answered, "no:" and upon this it is said that the tender was objected to merely because it was not sufficient in amount. But I take it that it was objected to altogether, not merely as being insufficient in amount, but also because the proper time was passed; and because it was a delusion, and not a real tender, and one which would not have been accepted, even if it had been in time, and to the proper amount; for it was not a tender that could be taken in payment.

Burke suffered nine months to pass after a formal demand, without doing any thing, and then he made only an illusory tender.

This is clearly a case of wilful neglect; Burke having full time to be prepared to meet the demand; and Kirby, who had been agent to Brabazon, being agent for Burke, and having in his possession all the documents necessary for making up the account. Burke was bound to tender the fines, and the leases for execution, and one month was amply sufficient for these purposes. He was bound to offer the fines and to present the leases for execution, and one month was amply sufficient for these purposes. He was bound to offer the fines, and to present the leases for

execution, for Barrett was entitled to have a tenant acknowledging the tenure, which was an important object in regard to property of this kind. What was the original object of these leases? Lord Lifford says, that the object was the improvement of the lands, and the more easy recovery of the fines and rents. The original design of these leases, then, was the proper cultivation of inferior lands, and the more easy recovery of the rent, a thing which in Ireland was often very difficult. This tenure was particularly important in the disturbed state of Ireland, as the lands were by that means in the hands of persons acknowledging themselves as lessees; for it often happened that, in the course of many years, no rent was paid, and if they had been simply fee-farm rents, there would be presumptions against them which would often deprive the landlord of his property. The object therefore of this tenure was to preserve the property; and every time the lease is renewed there is an acknowledgment of the tenure; and there is also the benefit of the covenants, which is totally lost if the leases are not renewed. So that it is of very great importance that the lease should be renewed when a life drops; and this is often the chief value of the renewal, the fines being hardly adequate to the expenses of suits.

The original design of these leases, the better cultivation of the lands, and more easy recovery of rent.

It is very important therefore that the relief should be confined to cases of mere neglect, and not extended to cases of wilful neglect; and that persons bound to pay the fines and tender the leases, should do so in a reasonable time. In the present case nine months were suffered to elapse before any thing was done, and then there was a jocular, rather than a serious tender, and nothing more was done. Nash had clearly forfeited his title by fraud, and the only one to claim was Burke, whose claim was founded merely in the indulgence of E. Brabazon. Burke had no right, except under that indulgence, his remedy being, in my opinion, only against Nash, and not against Brabazon. I think therefore that these decrees are wrong; that Burke is entitled to no relief as against Barrett; that the issue tendered was nothing as to the merits; and that the decrees ought therefore to be reversed, and the bill dismissed.

Decrees accordingly reversed, and bills dismissed. 5 *Dow.* P. C. 1.

Decree of the court below, reversed.

Observations on the Case of Barrett v. *Burke.*

Decrees of the Irish Exchequer reversed in the three last cases in this treatise.

This was also a case from the Exchequer of Ireland, and in this as well as in the next preceding one, *Mountnorris* v. *White*, and the succeeding one, *Fitzsimon* v. *Burton*, the decrees of the court of Exchequer in Ireland were in each reversed. The principle on which the Barons of the Exchequer and House of Lords seems to differ through these three cases may admit of this general statement; namely, that the Barons construe the Tenantry Act and equity of Ireland with a strictness protecting to the interests of the tenants; and the Lords, on the other hand, with a strictness protecting to the interests of the landlords. Much of the observations made by the Editor in this respect in preceding case of *Mountnorris* v. *White*, will apply also to this case.

This is the last of the *reported* cases on the subject of this Irish equity. They have heretofore lain dispersed and undistinguished through a variety of expensive and voluminous law publications, English and Irish: *Browne's Parliamentary Reports*, 8 vols.; *Vernon and Scriven's Reports; Ridgeway's Parliamentary Reports*, 3 vols.; *Schoales and Lefroy*, 2 vols.; *Ball and Beatty*, 2 vols.; *Dow's Parliamentary Reports*, 5 vols.; *Hogan, Batty, &c. &c.* Collateral references to this subject was also to be sought for through *Vesey, jun., &c.* In such a state of dispersion without any assistance from any index, for no index recognized such a head as that of Irish Renewals, it was a matter of some difficulty to ascertain the commencement and continuation of these reported cases to their conclusion, in the order of time in one connected progressive and unbroken line. This has been done now for the first time. The reference to some of these cases in *Gwillim's, Bacon's Abr. tit. Leases*, gives a very brief and imperfect view of this subject: it is supposed, but by no means certain that the title, "Leases," in that work was written by Sir Jeffry Gilbert; and as he had been Chief Baron of the Exchequer in Ireland at the time when this pecular system of equity acquired much of that shape and modification which it has since, and still retains, it might be inferred that any reference to this subject under that head would come under the recommendation of a probable authority. But in point of fact, Irish Renewals are not in the most distant manner re-

ferred to in the original work, and the reference thereto which now occurs in that work is the introduction of the late editions, and exclusively the work of its editor.

The cases on this subject must therefore be considered as here collected for the first time: but it must not be supposed that the decisions on this subject bear even a near proportion to those which have not been reported. Lord Lifford said, he had ascertained that innumerable decisions in support of the Irish equity had passed *sub silentio*, even before the case of *Bateman* v. *Murray*. In respect to all those cases, whether reported or only known by reference, recollection, or otherwise, it would seem, so far as can be known or conjectured, that they were all cases on which *fines* as well as rent were reserved to the lessor. No case ever yet came before a court of Equity in this country wherein the renewal was made conditional on the payment of *rent alone*, without any mention of fines. There is however no doubt, that there are leases of that description in Ireland; and that the tenant's right to a renewal, grounded on a wilful and protracted neglect to pay his *rent* after repeated demands, might be urged against his application to a court of Equity, as a ground in Equity to disentitle him to a renewal. Should such a case arise it would make a new question. There is no precedent on this subject, but by analogy, (and equity is a system of analogies,) the wilful neglect which in cases of fines disentitles the tenant to renewal, applies also to the case of rent withheld after repeated demands. It is even arguable as applying more strongly, because renewal fines not only carry interest, and interest so high as that of the times when the debt became due, varied according to the subsequent variations in the interest of the country, (*vide ante*, p. 157,) but they also in all cases where the neglect of payment exceeds seven years, carry with them septennial fines with interest also on them: whereas arrears of rent, however protracted, carry no interest whatsoever, and therefore the landlord must suffer a greater injury by the accumulating arrears; and the court of Equity will find the greater difficulty to decree a renewal, because compensation to the landlord by the tenant for the results of his own breach of contract, is *essential* to enable a court of Equity to relieve against its inconveniences: and here the scale of compensation will not apply.

Qoery? As to the tenants right where the renewal is made conditional on the payment of rent alone?

No precedent on this point.

Where the party cannot be compensated in damages, it would be against conscience to relieve; and that was the

reason of the judgment in *Fry and Porter's* case, where the daughter having married without such consent as by the condition was required, the non-performance of that condition could not be compensated in damages. *Popham* v. *Bampfield*, 1 *Vern.* 83.

Septennial fines more than an adequate compensation.

Sir Jeffry Gilbert or the high legal authorities who have supported the equity ef Ireland, never contended that the tenant could be relieved, and the ill effects of his own broken contract repaired, unless compensation could be made to the landlord, and accordingly the scale of septennial fines was invented to meet that otherwise unanswerable objection. Lord Pery said, that septennial fines were more than an adequate compensation to the landlord for his loss, *vide ante*, p. 113, but that was the proper side to lean to, because compensation was the difficulty to be obviated: the loss to the landlord was the injury to be remedied, and therefore it was wise in the invention of the scale to make it a generous one, lest it might sometimes be an unjust one, and if too much, the less material, because the tenant was getting the boon, and had made his own difficulty, and there was no other mode of arrangement. For all these reasons a special compensation was decreed as to these fines; but where no interest can be charged, and no such scale can apply, how can compensation be decreed? And if it can not, all the objections of Lord Eldon in this case, and the next preceding and succeeding one, on the impropriety of granting renewals to the tenant in cases where compensation cannot be made, apply in full force. There is no answer to Lord Eldon, but by pointing to septennial fines: in this case there can be no such, nor any compensation; and therefore it would appear to the Editor, that equity *could not* renew, because compensation was impossible; nor would a refusal to renew in a case of long protracted neglect by the tenant be a matter to be lamented. Suppose, for instance, as in the late case of *Shenton* v. *Corballis* in Chancery, where, in addition to the circumstance that all the lives had dropped, arrears of rent had been suffered to accumulate for twelve years: or suppose, as in the case of *O'Brien* v. *Neville* some years ago in Exchequer, the tenant had never paid his rent during nineteen or twenty years without an ejectment; having made a calculation that the interest on the year's rent, withheld by him, exceeded the costs of an ejectment; the Editor thinks it would be not according to any principles of equity in either country to permit such a tenant to compel his landlord to a renewal.

The Editor is supposing that no fines whatsoever are in the case, and that the renewal is made conditional on the mere payment of rent: this is different from the case of *Jessop* v. *King*; in that case the covenant was for the payment of both rent and fines; but this is referring to a case where the covenant is for rent alone; in such a case *punctuality* in the payment of the rent, is the only consideration required by the landlord for the renewal: the rent is the consideration for the enjoyment of the land; and *punctuality* in its payment is the consideration for the renewal. If then in place of such punctuality there is a neglect of payment, suppose for nearly twenty years; the presumption of law is about to arise, not only that the fee is in the tenant, as in the case of a fee-farm, but as in the case of a fee-simple freed from rent altogether. Here then would be the case of a tenant, who not only withholds from his landlord his rent perhaps during his life, but raises a presumption by its protracted non-payment, which threatens to enable him to usurp the estate altogether. It is clear that this case would not be within the Tenantry Act; because fines are the badges which distinguish the cases under the enacting part of that statute. The Editor doubts, for the same reason, whether it be within the old equity as declared by the statute, because it describes that equity as applicable to cases *with fines*. If therefore the class of cases which the Editor is supposing would neither lie under the Tenantry Act, or the old equity, no other principles than those of the equity of England could be applied to it; and under any of those, *vide ante*, p. 216, but more particularly under the principle that compensation is essential, the Editor apprehends that no relief could be grantable to the tenant, because the substituted compensation of septennial fines could not be applied and any other compensation would not be practical.

The next case has not been before reported.

In an Appeal from the Court of Exchequer in Ireland.

C. Fitzsimon, Esq. Appellant.
W. F. Burton, Esq. Respondent.

Case of *Fitzsimon* v. *Burton.*

Abstract of the Appellant's Case.

In 1707 C. Fitzsimon granted a lease

On the 3d March, 1707, C. Fitzsimon, an ancestor of the appellant, being seised in fee-simple of the town and lands of Ballinamona, in the county of Wicklow, in Ire-

land, by indented deed of that date, demised the said town and lands to Henry Aston, to hold to the said H. Aston, his heirs and assigns, for three lives therein named, at the yearly rent of £10 sterling; in which indenture was contained a covenant on the part of the said C. Fitzsimon, his heirs and assigns, for the perpetual renewal thereof upon the payment of a fine of £5, and the nomination of a new life within six months after the fall of each life happening to die; with a covenant on the part of the said H. Aston, his heirs and assigns, that he and they should and would pay a fine of £5 within six months next after the failure of each life; and with a proviso, in default of payment of such fine and nomination of a new life within six months after the failure of any life in said demise named, or thereafter to be named, that it should be lawful for the said lessor, his heirs and assigns, for ever thereafter to refuse to renew the said demise. The following is the covenant:

of lands to H. Aston, his, &c. at the rent of £10 a year, for three lives, with a covenant for a perpetual renewal, on payment of a fine of £5 on the drop of each life, within 6 months after such event, and nominating another life in lieu thereof, and with a proviso that in the event of such payment and nomination not being made, in addition to the payment of the annual rent, within the time aforesaid, it should be lawful for C. Fitzsimon, his, &c. for ever after to refuse a renewal; and that the premises, after the drop of the lives then existing should be and remain unto the said C. Fitzsimon, his, &c.; and the deed and demise aforesaid thenceforward to determine and be utterly void to all intents and purposes.

"And the said C. Fitzsimon doth hereby for him, his heirs and assigns, covenant, promise, and agree to and with the said H. Aston, his heirs and assigns, that upon the death or failure of any of the aforesaid lives of the said E. Aston, N. Waddington and J. Falkiner, or any of them which shall first happen, and he the said H. Aston, his heirs and assigns, paying or causing to be paid unto the said C. Fitzsimon, his heirs or assigns, the full and entire sum of £5, as herein is reserved, over and above the annual rent as herein before reserved, within six months next after the failure of such life; and upon the nomination of the life of any other persons, by the said H. Aston, his heirs or assigns, at his or their request to be put and inserted in the place and stead of the person so happening to die as aforesaid, that then the said C. Fitzsimon, his heirs or assigns, shall and will within six months after the death of such persons so happening first to die as aforesaid, add and insert to the time and term of the said lease the life of such person so nominated in the place and stead of such person so happening first to die as aforesaid; which life so added and inserted, is to be endorsed on this lease, or to be written on a deed, label, or parchment, to be affixed to this lease for that purpose; and in like manner from time to time, successively for ever, upon the failure of every several life in this lease now nominated, or hereafter successively to be nominated as aforesaid, and upon the like payment of the entire sum of £5 sterling, as herein is reserved, over and

above the annual rent herein reserved, within six months next after the failure of every other such several life, and upon the nomination of any other life successively, in lieu of every several life so failing as aforesaid, that then the said C. Fitzsimon, his heirs and assigns, successively shall and will, within six months next after the failure of every other life nominated as aforesaid, add and insert to the time and term of this lease, from time to time for ever, the several life or lives of such person or persons to be nominated in the place and stead of the life or lives of the several person or persons successively happening to die as aforesaid; which several lives, so to be added and inserted successively, are to be endorsed on this lease, or written in deed, label, or parchment, affixed thereunto as aforesaid. And the said H. Aston doth hereby for himself, his heirs and assigns, covenant, promise and agree, to and with the said C. Fitzsimon, his heirs and assigns, by these presents, that he the said H. Aston, his heirs and assigns, from time to time, and at all times hereafter, upon the death or failure of every life of every several person or persons herein above-mentioned, for whose life this present lease is made, or hereafter shall be renewed as aforesaid, shall and will for every life that shall so fail, satisfy and pay to the said C. Fitzsimon, his heirs and assigns, the full and entire sum of £5 sterling, over and above the annual rent herein reserved, within six months next after the death or failure of such life; and every such payment is to be made without any manner of deduction or defalcation whatsoever. Provided always, that if it shall happen, upon the failure of any life herein above nominated, or hereafter to be nominated, the said H. Aston, his heirs or assigns, shall not or do not pay unto the said C. Fitzsimon, his heirs and assigns, for every such life so failing as aforesaid, the said full and entire sum of £5, over and above the annual rent aforesaid, within six months after the failure of every such life as aforesaid; and also shall not, within the space of six months after such failure, nominate the life of one other person in lieu thereof, to be added to the time and term of this demise as aforesaid, that then it shall and may be lawful to and for the said C. Fitzsimon, his heirs and assigns, for ever hereafter to deny and refuse the said H. Aston, his heirs and assigns, to add, insert, and nominate, or put any other life or lives to the time and term of this demise, other than the life or lives which shall be then in being; and then, and in such case also, the said demised

premises, after the determination of such lives which then shall be in being, shall be and remain unto the said C. Fitzsimon, his heirs and assigns; and that then this present deed and demise to determine and be utterly void to all intents and purposes as if these presents had never been made.

The estate of the lessor became vested in the appellant;

The estate and interest of the before named C. Fitzsimon in the said lands, became vested in the late C. Fitzsimon, the appellant's grandfather: upon whose death, which happened on the 4th February, 1812, the same became vested in the appellant, who was then an infant under the age of twenty-one years, and a ward of the court of Chancery in Ireland.

who, in 1821, found that there was a large arrear of rent due to him;

The appellant, after he attained his full age of twenty-one years, examined into his affairs; and in the year 1821, found that there was a large arrear of rent due to him out of said lands; for that there had not been any rent paid for same since he had become proprietor of the estate; in consequence of which he set about to inquire in whom the tenant's interest in said lands had become vested; and whether any and what renewals of the lease of said lands had been executed by the said C. Fitzsimon, his grandfather.

and that the last renewal of said lease was made to W. Burton, the grandfather of the respondent, in 1781, and that the respondent was the person seised of the lessee's interest;

Upon such inquiry, the appellant found among his family papers the said original lease of the 3d March, 1707, and several renewals thereof; the last of which renewals was dated the 5th day of March, 1781, and appeared to have been executed by the said C. Fitzsimon, his grandfather, to W. Burton, of Burton Hall, in the county of Carlow, Esq. for the lives of his late Majesty, King George the Third, and of B. Burton and W. Burton, therein named, sons of the said W. Burton, of Burton Hall; and the appellant on inquiry respecting the said W. Burton, who was dead, was informed, that W. F. Burton, Esq. the respondent, was his heir and representative, and the person who ought to pay the rent of said lands.

as also two of the *cestui que vies* in said last renewal were many years dead, and that the last life in it was that of his late Majesty, King George the Third.

The appellant also ascertained, that E. Burton and W. Burton, two of the *cestui que vies* named in the last renewal of said lease of the 3d March, 1707, had been sons of the said W. Burton, who was the grandfather of the respondent, and consequently were the respondent's uncles; that they had been both dead for many years, and that of course the last renewal of said lease of 1707 had expired on the decease of his late Majesty King George the Third.

The rent of said lands having been withheld, not only during the whole of the appellant's title thereto, which had accrued in the month of February, 1812, but for some years prior to the death of the appellant's grandfather, the appellant, on the 10th April, 1821, caused a notice, bearing date the 3d of the said month, to be served on the respondent, stating, that there were many years' rent due to the appellant out of the said lands, and also requiring payment of the renewal fines due for many years out of said lands, and of septennial fines; which notice was served on the respondent, by the delivery of a true copy thereof to his man servant, at his dwelling house or place of residence in the city of Lincoln.

Demand of payment.

The respondent, who had so long omitted to pay either the rent of said lands, or any of the fines payable for renewing the lease thereof, not having attended to said notice, or paid either the rent or renewal fines mentioned therein, the appellant, on the 17th day of January, 1822, above nine months after serving the said notice, caused an ejectment on the title, at the suit of his feigned lessee, to be served on the respondent, for the recovery of the possession of said lands; thereby giving full intimation to the respondent of the appellant's intention to act upon his default in not having paid the arrears of rent due out of said lands, or any fines for renewal of the lease thereof: notwithstanding which the respondent did not then submit to pay said rent or fines, but stood upon his possession, and afterwards, on the 6th February, 1822, took defence at law to said ejectment; whereby, as the appellant is advised, and most humbly submits, the respondent set up his own possession against the title of the appellant, without even at that late period admitting that he had been subject to the payment of rent, and that he had been bound to pay a renewal fine, and nominate a new life, within six months after the death of each of the said *cestui que vie*, before he could be entitled to call for a renewal of the lease of said lands.

Ejectment served by appellant.

Defence taken to said ejectment by respondent.

The respondent afterwards gave up his claim to an adverse possession, and caused a notice to be served on the appellant, which was dated on the 1st of March, 1822, and was served on the 2d of said month, in which he, as heir at law of his grandfather, the said W. Burton, of Burton Hall, called upon appellant, as heir at law of his grandfather, the said C. Fitzsimon, and as being seised of the said lands of Ballinamona, to execute a renewal to him,

which he then sent, of the lease of said lands; the estate and interest of the said H. Aston therein, under said lease of the 3d March, 1707, having as he stated, devolved on the said W. Burton, his grandfather; and which renewal the respondent by his said notice claimed to be entitled to, under the covenant for renewal contained in said lease, and, as in performance upon his part of the conditions on which he was to become entitled to the benefit of said covenant, sent with said notice £40, as for four years rent of said lands down to 1st Nov. 1821; being the rent which the respondent stated by his said notice had accrued since the death of his grandfather, the said W. Burton, of Burton Hall, but without sending payment of the rent previously due out of said lands: and the respondent also sent £55 17s. 1½d as for renewal fines and interest due, according to certain calculations to his said notice annexed.

Stated the death of one of the *cestui que vies* on 31st December, 1799; of another, on 26th April, 1808;

In the calculation annexed to respondent's said notice of the 1st of March, 1822, the death of W. Burton, one of the lives named in the last renewal of said lease of March, 1707, and who was an uncle of respondents, was stated to have happened on the 31st December, 1799, which was upwards of twenty-three years previous to the service of his said notice; and the death of B. Burton, another of his lives named in said last renewal of the lease of 1707, and who was also an uncle of the respondent's, was stated to have happened on the 26th of April, 1808, which was about fourteen years previous to the service of his said notice; and it was therein stated, that his late Majesty, King George the Third had died on the 29th day of January, 1820, which was near two years prior to the service thereof.

and of his late Majesty, on 29th January, 1820.

Appellant's notice refusing to grant one.

On the 7th of March, 1822, the appellant caused a notice in answer, to be served on the respondent, by which he declined to execute said renewals, and called upon the respondent to give up to him the possession of said lands, and not to involve the appellant in any unnecessary expense or litigation: but which he declined to do.

Respondent's bill.

And on the 20th of April, 1822, the respondent filed his bill at the equity side of his Majesty's court of Exchequer in Ireland, against the appellant; charging the said lease of the 3d of March, 1707, and the covenant therein contained for the perpetual renewal thereof; and that the said lease had been several times renewed; and that the last thereof had been executed on the 5th of March, 1781, by C. Fitzsimon, Esq. the appellant's grandfather, in whom the lessor's interest in the lands demised by said lease was

then vested, to W. Burton, of Burton Hall, the respondent's grandfather, who had acquired the lessee's interest under said lease, for the lives of the said B. Burton and W. Burton, sons of the said W. Burton, of Burton Hall, and of his late Majesty King George the Third: that the said W. Burton, his grandfather, had died in January, 1818, and that the respondent had thereupon become entitled to the said lands, and to the lessee's interest therein, and right of renewal thereof, under the said lease of 3d March, 1707, and the several renewals which had been granted thereof: and that an ejectment having been brought at the suit of the lessee of the appellant, he had taken defence to said ejectment.

And charging that the respondent had on the 2d of March, 1822, caused the renewal fines and rent, which he stated to have accrued since he had become entitled to said lands, to be tendered by notice in writing to the appellant, according to the calculation to said notice annexed, which said notice and the calculation annexed are herein before more particularly alluded to: and he had stated, that he had called on the appellant to execute to him a renewal of the lease of the said lands, and that the appellant had refused to accept the rent and fines so tendered, or to execute said renewal.

The respondent, by his said bill, further stated, that he had been served with the appellant's said notice in answer, which was dated the 7th of March, 1822, and in which the appellant's notice of the 3d April, 1821, expressly demanding payment of renewal fines, is stated: and the respondent, who did not by his said bill deny the fact, that said notice of the 3d of April, 1821, had been served, and such express demand thereby made on him, yet he by his said bill required the appellant to set forth the nature of the express demand of the 3d of April, 1821, in the appellant's said notice of the 7th March, 1822, mentioned; and upon whom and by whom the same had been made, and whether verbally or in writing, and where and when, and at what hour of the day the same had been made, and to set forth the name of the person by whom served, together with his residence and occupation, and also the contents verbatim of such demand, if in writing, and to whom addressed and directed.

Praying an account of sum due for rent and

And the respondent by his said bill prayed, that an account might be taken of what was due to the appellant for rent and renewal fines under the said lease of the 3d of

March, 1707, and the several renewals thereof: and that on payment of what should appear to be due to the appellant on such account, or such other sums as he should appear equitably entitled to, (and which the respondent thereby set forth he had offered to pay the appellant,) the appellant might be decreed to execute to respondent a renewal of said lease of the 3d of March, 1707, in pursuance of the covenant therein, for the lives nominated in the renewal, which was so as aforesaid tendered to him for execution.

renewal fines, and on payment of same, that the appellant might be decreed to execute a renewal.

The appellant on the 2d day of May, 1822, filed his answer to said bill, in which he admitted the said indenture of the 3d of March, 1707, and the covenant for renewal, as contained therein, and also admitted, that the estate of the lessor in said lease had become vested in him, as herein before mentioned, when he was a minor, and a ward of the court of Chancery in Ireland: and that the estate of the said lessee had become vested in the respondent on the death of his grandfather, the said W. Burton, of Burton Hall.

Appellant's answer, 2d May, 1822.

The appellant also stated, that he having found that there had not been any rent or renewal fines paid for said lands since 1812, when he had become seised of them: and having been informed that the respondent, on the death of his grandfather, had become entitled to the lessee's interest in said lease, had directed the notice of the 3d April, 1821, herein before mentioned, to be served on the respondent; and that the respondent not having paid any attention to said notice, the appellant had caused the ejectment herein before mentioned, to be served on the respondent on the 17th January, 1822, that he had taken defence to said ejectment on the 6th of February, 1822, and that on the 2d of March, 1822, the sum appearing by the calculation or account annexed to the respondent's notice of the 1st of said month, as for the renewal fines and rents, which the respondent stated had become due since the death of his grandfather, had been tendered to the appellant, and that the appellant had refused to receive same, or to execute the renewal required, and thereupon had served the notice in answer of the 7th March, 1822, herein before mentioned.

He had caused a notice of 3d April, 1821 to be served; that it not having been attended to, he had served the ejectment, and that the respondent had taken defence thereto.

And the appellant, as required by the respondent's bill, set forth on his said answer, that his said notice of the 3d of April, 1821, had been served on the 10th of the said month, at one o'clock in the afternoon of said day, on the respondent's servant man, at his dwelling house or

The particulars of the service of the notice.

place of residence at Lincoln, by a person of the name of H. Noble, and that said Noble resided on the appellant's estate at Glancullen in the county of Dublin.

The respondent did not cross-examine the witness, or produce any witness of his own on the subject.

Notwithstanding which, and though the appellant, on the examination of witnesses in said cause, produced and examined the said H. Noble as a witness, to prove the service of said notice, the respondent did not cause him to be cross-examined, or produce on said examination any servant who had resided with him on the said 10th of April, 1821, to be examined, nor was any person examined in said cause to disprove the service of said notice.

Judgment in ejectment.

The appellant on the 27th June, 1822, obtained judgment in said ejectment cause; and the respondent having replied to the answer of appellant in the said case in the equity side of the court of Exchequer in Ireland, and the appellant having rejoined, and issue having been joined in said cause, divers witnesses were examined on both sides, and publication having passed, and said cause having been set down to be heard, on pleadings and proofs, it came on to be heard before the Lord Chief Baron and the rest of the Barons of his Majesty's court of Exchequer in Ireland, on the 24th January, 1823; upon which hearing it was relied upon on the part of the respondent, that he had not been in any default, for that it was incumbent on the appellant to have made a demand on the respondent for payment of renewal fines, pursuant to the Irish statute of the 19 and 20 Geo. 3. c. 30, before the respondent could be precluded from the benefit of the covenant for renewal, contained in said lease of the 3d of March, 1767; as against which it was insisted on the part of appellant, that according to the terms of the said covenant, and of the proviso annexed thereto, it was not incumbent on the appellant to have made any demand on the respondent pursuant to said statute; but that if it was incumbent on him to have done so, he in point of fact had made such demand by the service of said notice of the 3d April, 1821. To which it was objected, on the part of the respondents, that the appellant had not made sufficient proof of the service of said notice; but on the part of the appellant it was insisted that he had made sufficient proof of the service thereof, for that the said H. Noble, the witness who served said notice, had deposed that he had served same on the respondent's man servant, at his dwelling house, or place of residence in Lincoln, on the 10th April, 1821, and that the respondent, though he by his bill in said cause stated that he had been served with the appellant's notice of the 7th of March,

Cause heard 24th Jan. 1823.

Arguments on behalf of respondent;

like on the part of the appellant.

1822, in which said notice of the 3d of April, 1821, was referred to, as having been served on him, yet had not by his said bill controverted the fact of his having received said notice; and though apprized by the appellant's answer of the name of the person who had served it, and of the day and hour on which it was served, and that it had been served on his man servant, yet that he had not cross examined the witness who proved the service of said notice; nor had he produced or examined any man servant of his to disprove the service of it; under which circumstances it was insisted on the part of the appellant, that the service of said notice of the 3d April, 1821, was sufficiently proved, even supposing, but by no means admitting it to have been incumbent on him to have made the demand of renewal fines on the respondent, contained in said notice. But the said court of Exchequer was pleased, notwithstanding the terms of the covenant and proviso contained in said lease of the 3d of March, 1707, to be of opinion, that it was incumbent on the appellant to make a demand of renewal fines on the respondent, pursuant to said Irish statute of the 19 and 20 Geo. 3. c. 30; and also to be of opinion, that the service of said notice of the 3d April, 1821, containing such demand, had not been sufficiently proved. And accordingly upon reading the several proofs, testimonies, and evidences in said cause, and also appellant's said answer in said cause, their Lordships were pleased to decree that it should be referred to the officer to take an account of what was due to appellant for rent, arrears of rent, and renewal fines; and in taking such account of fines, that the officer should charge septennial fines and interest thereon, according to the course of the said Court of Exchequer; and on payment of such sums as should be found due on the accounts aforesaid, and the costs of the cause, that the respondent should be entitled to a renewal, &c.

Court of Exchequer of opinion that a demand pursuant to the Irish statute was necessary,

and that the service of the notice of 3d April had not been sufficiently proved.

Decree.

From this decree the present appeal is brought.

Abstract of the Case of the Respondent.

By indenture of demise, bearing date the 3d day of March in the year 1707, Christopher Fitzsimon, then of the city of Dublin, Merchant, who was the ancestor of the appellant, being seised in fee-simple of the lands therein and hereinafter mentioned, did, for the considerations in the said indenture mentioned, grant and demise unto H. Aston, then of the city of Dublin, Esq. since deceased, who was the

Deed of renewal, 1707.

maternal great great grandfather of the respondent, all that and those the town and lands of Ballinamona, containing by estimation 75 acres, be the same more or less, situate in the barony of Arklow and county of Wicklow, to hold to the said Henry Aston, his heirs and assigns, for the lives of Edward Aston, Nicholas Waddington, and John Faulkner, all therein named, at the yearly rent of £10 sterling, payable half yearly, in which said indenture there is a clause or covenant by and on the part of the said Christopher Fitzsimon, his heirs and assigns, for the perpetual renewal thereof, on payment of the sum of £5 on the fall of each life, as by the said original indenture may appear, one part of which said indenture is admitted by the appellant's answer (in the cause from the decree in which he has appealed) to have come to his hands, but no part of which ever came into the power or possession of the respondent.

The said Henry Aston having become seised of said lands under and by virtue of said indenture, by his last will and testament, by him duly executed in the presence of three credible subscribing witnesses, and bearing date on or about the 16th day of March 1712, did give and bequeath all his lands, tenements, hereditaments, and real estate whatsoever, to his eldest son Henry Aston, and the heirs of his body, with several remainders over, in which bequest the interest derived under the said lease was comprehended.

The said Henry Aston the elder afterwards died, without altering or revoking his said last will, whereupon the said Henry Aston the younger became thereunder seised of a *quasi* estate tail in the lands comprised in said indenture.

The said Henry Aston the younger, being so seised and entitled, intermarried with one Martha Ashe, by whom he had only one child, namely, Mary Aston, and the said Henry Aston the younger, having thereafter, and previous to the 10th of October, 1765, died without leaving any other issue, the said Mary Aston was his heiress in tail, and thereupon became seised of and entitled to the lessee's interest in said lands, and in the indenture by which the same were so derived.

The said Mary Aston being so seised, by deed bearing date the 10th of October, 1765, and made between the said Mary Aston of the one part, and Edward Scriven, of the city of Dublin, gentleman, of the other part, covenanted and agreed, for a nominal consideration, that she would, before the end of the then next Michaelmas Term, levy a fine

sur concessit of the said lands of Ballinamona, otherwise East Acton, in the barony of Arklow and county of Wicklow, to the use of the said Mary Aston, her heirs and assigns, for and during the natural life and lives of Susanna Rossell, and of said Nicholas Waddington, and his late Majesty King George the Third, and the survivors or survivor of them, and for and during the natural life and lives of such other person or persons as should, from time to time, successively for ever thereafter be added and inserted by virtue of the covenant for renewal, contained in the said indenture of the 3d March, 1707, at and under the yearly rent and covenants in and by the said indenture reserved and contained to be paid and performed.

The said fine of the said lands of Ballinamona, otherwise East Acton, was levied accordingly by said Mary Aston in Michaelmas Term, 1765, in his Majesty's court of Common Pleas in Ireland, as by the records of said court may appear.

A marriage having been agreed on by and between said Mary Aston and William Burton, Esq. the paternal grandfather of the respondent, a deed of settlement, bearing date the 7th day of December, 1765, was entered into and made between Benjamin Burton the father of the said William, and the said William of the first part, the said Mary Aston of the second part, and the Right Hon. John Ponsonby and Thomas Cooke of the third part, by which said settlement the estates of the said Mary Aston, and amongst the rest the lands of Ballinamona, otherwise East Acton, in the said county of Wicklow, were vested in the said John Ponsonby and Thomas Cooke, upon trust, to sell the said estates of the said Mary, and so much of the estates of the said Benjamin Burton and William Burton as would be sufficient to pay off a certain sum of £10,000 therein mentioned, as agreed upon to be paid thereout; and after payment thereof, as to so much of the said estates as should remain unsold, subject to certain annuities therein mentioned, and which had long since determined, to such person or persons as the said Benjamin Burton and William Burton should appoint, to the same uses as are thereby declared, as to the estates of the said Benjamin Burton (that is to say) charged and chargable as therein mentioned, to the use of the said Benjamin Burton, for and during the term of his natural life, and from and after his decease to the use of the said William Burton for life, with remainder on his death to his first and every other son by the said Mary Aston, in strict settlement with other remainders

over, as by the said last mentioned deed in the hands of the respondent, or those concerned for him, may more fully and at large appear.

The said lease of March 3d, 1707, having been in or about the month of March, 1747, renewed for the lives of the said Susanna Rossell, widow, Nicholas Waddington, and his late Majesty King George the Third then Duke of Cornwall; and said Nicholas Waddington and Susannah Rossell having thereafter died, by indenture of renewal bearing date the 3d day of March in the year 1773, and made between Christopher Fitzsimon, grandson and heir of the aforesaid Christopher Fitzsimon, merchant, the lessor in the said lease of 3d March, 1707, of the one part, and the said William Burton, by his then name and addition of William Burton of Burton Hall in the county of Carlow, Esq. of the other part, after reciting the aforesaid indenture of the 3d March, 1707, and that the estate and interest of the said Christopher Fitzsimon, merchant, in said lands was then vested in the said Christopher Fitzsimon, party thereto; and after reciting also that the interest in the said lease and right of renewal had become vested in the said Mary Burton otherwise Aston, the wife of the said William Burton, and that the said Nicholas Waddington, one of the lives named in said lease, had died many years before, and that there was then due to the said Christopher Fitzsimon for said fine and septennial fines and interest the sum of £37 8s.; and after reciting also that the said Susanna Rossell, widow, one other of the lives named in said renewal of said lease was dead, and that there was then due for a fine on that account the sum of £5 6s.; and after reciting also that by a renewal of said lease Prince George Duke of Cornwall, then King of Great Britain, was named a life in the room of Edward Aston deceased, and was then the only life subsisting in said renewal, the said Christopher Fitzsimon, in consideration of the said sums of £37 8s. and £5 6s. and the sum of £15 for one and a half year's rent of said lands, making in the whole £57 14s. to him paid, did add and insert the lives of Benjamin Burton and William Henry Burton, sons of the said William Burton, to the term of the said recited lease, in the room of the said Nicholas Waddington and Susanna Rossell, deceased, to hold to the said William Burton, his heirs and assigns, for and during the lives of King George the Third, and of the said Benjamin Burton and William Henry Burton, and for and during such

other lives as pursuant to the covenant for renewal in said indenture, and said confirmation thereof, should thereafter be added thereto, subject to the rent, renewal, fines, and covenants in said original indenture mentioned as by said renewal in the hands of the respondent or those concerned for him may more fully appear.

Further deed of renewal of 5th March, 1781.

By a further deed of renewal, bearing date the 5th day of March, 1781, and made between Christopher Fitzsimon of the city of Dublin, Esq. of the one part, and the said William Burton, of the other part; after reciting the said original indenture and renewal of the 2d March, 1747, and that the fee and inheritance in the said lands had become vested in the said Christopher Fitzsimon, and that the benefit of said lease and right of renewal had become vested in the said William Burton, and after reciting also that the said Nicholas Waddington and Susanna Rossell were long since dead, and that said William Burton, on the 3d March, 1773, named the lives of his two sons Benjamin Burton and William Burton to be inserted in a renewal of said lease instead of said Waddington and Rossell, and that he then paid to said Christopher Fitzsimon £57 14s. for renewal, fines, and interest, and the rent of said premises to the 1st November then last, the said Christopher Fitzsimon for and in consideration of said sum of £57 14s. to him therefore paid, and the further sum of £20, then paid as and for rent and arrears of rent to 1st May then last, and in pursuance of the covenant for renewal in said original lease contained, did add and insert the lives of the said Benjamin Burton and William Burton, the sons of the said William Burton, party to said deed of renewal, instead of the said Waddington and Rossell; and did thereby demise and set unto the said William Barton all that and those the said town and lands of Ballinamona, as the same were demised by the said original lease, to hold to the said William Burton, his heirs, executors, administrators and assigns, for and during the lives of his said late Majesty King George the Third and of the said Benjamin Burton and William Burton, and for the lives of all such other persons as should be added thereto pursuant to the said original lease and covenant for perpetual renewal therein contained, subject to the rent and covenants therein, as by said last mentioned renewal in the hands of the respondent, or of those concerned for him, reference being thereunto had, may more fully appear.

The said Benjamin Burton, who was the father of the

respondent, and the eldest son of the said William Burton, having attained his full age, and being then seised of reversion in *quasi* fee of said lands of Ballinamona, duly made and published his last will and testament in writing, and thereby devised the said reversion with others to the respondent and his heirs, and died in the year 1800, without altering or revoking his said will, leaving the respondent his eldest son and heir at law, and also heir apparent of his said grandfather William Burton, and the respondent thereupon became seised of and entitled to said reversion in said lands of Ballinamona, expectant on the decease of his said grandfather, William Burton.

The respondent's grandmother, the said Mary Burton, otherwise Aston, died in or about the month of November, 1810, in the lifetime of her husband the said William Burton, and the said William Burton died in or about the month of January, 1818, whereupon the respondent became seised of and entitled to said lands of Ballinamona, and all the Lessee's interest and right of renewal therein under said lease of 3d March 1707, and the said several renewals thereof.

The respondent was born and educated in England, and constantly resided there until after the death of his said grandfather, and upon that event was wholly ignorant of the state and circumstances of the estates and properties which then devolved upon him, and though he had a resident agent in Ireland, namely, Mr. Matthew Murphy of Ballyallen Mills, in the county of Carlow, and that to the knowledge of the appellant and those connected with and concerned for him, yet no rent was claimed or demanded by or on the part of the appellant for the said lands of Ballinamona, either from the respondent or from the said Matthew Murphy, since the death of respondent's said grandfather, William Burton, by reason whereof no rent was paid for the same by the respondent since the death of his said grandfather.

In the month of January 1822, an ejectment on the title to recover the possession of the said lands of Ballinamona, then in the occupation of the respondent's under tenants, was served upon the respondent at the house of his mother in Lincoln (where he then resided and still continues to reside) at the suit of the appellant, who is the present inheritor of the rent and reversion in the said lands, upon several demises in the names of James Taylor, Christopher

Taylor, William Caulfield, Anthony Kehoe, and of the appellant.

The respondent, upon the service of the ejectment, went over to Ireland, and caused defence to be taken thereto, for the purpose of preventing judgment by default, and in order to afford him an opportunity of inquiring into the circumstances under which the said ejectment was brought.

The respondent having made diligent search and inquiry into the state and circumstances of the said lands, discovered for the first time upon such search that the last renewal which had been obtained thereof by the family of the respondent from the family of the appellant, was the said deed of renewal of the fifth of March, 1781, granted by the said Christopher Fitzsimon the ancestor of the appellant to the said William Burton the paternal grandfather of the respondent, and that his late Majesty King George the Third was the survivor of the three persons therein named, for whose lives the said renewal had been so granted.

The estate and interest of the said William Burton in the said lands having devolved upon the respondent, and the respondent being anxious to avoid litigation, did not put the appellant to the necessity of proceeding to a trial of said ejectment, although there was, as respondent was advised, certain legal bars to the appellant's recovery upon a trial of the said ejectment, if the respondent had thought proper to avail himself thereof.

The respondent having upon such search and inquiry informed himself of the several rights of the appellant and respondent, but being unable to ascertain whether any arrears of rent were due out of the said lands at the time of the death of the respondent's grandfather, which took place in the month of January, 1818, no demand for such rent having been at any time made upon the respondent, or on his agent in Ireland, or on his tenants to said lands; but the respondent having upon inquiry ascertained the periods at which the three lives named in the said deed of renewal had fallen, the respondent caused an accurate calculation to be made of the sum due on foot of the fines payable in respect thereof, on the principle of fines, septennial fines, and interest; and also caused two parts of a deed of renewal of the said original lease of the 3rd March, 1707, which had been so made and executed by and between the respective ancestors of the appellant and respondent, to be prepared in pursuance of the covenant for perpetual renewal therein contained, and on the 2d March, 1822, the

respondent caused the full amount of the sums due on foot of said renewal fines, together with all rent that had accrued due since the death of the respondent's said grandfather, to be tendered to the appellant in person; and the respondent at the same time caused the notice of the 1st March, 1822, in the pleadings mentioned, to be served upon the appellant, calling upon him to execute such renewal, and explaining the nature and object of such tender, and thereby setting forth (according to the fact) that as from the respondent's being a stranger in Ireland, and to the affairs of his said grandfather, and his ignorance of the payments theretofore made by him either on account of the said arrears of rent or renewal fines, the respondent might have miscalculated the same, the respondent requested by his said notice that the appellant would state any error that existed in such calculation, and that the respondent was ready forthwith to pay such further sum (if any) as the appellant should be entitled to on foot thereof, on being informed by him of the amount; and the respondent, at the time of the service of the said notice, procured the said deeds of renewal which the respondent had so caused to be prepared, and which were in the first instance duly executed by him, to be tendered to, and one part thereof left with the appellant for execution; but the appellant refused to accept the said rent and renewal fines so tendered, and to execute the said renewals, upon the grounds stated in the notice of the 7th March, 1822, in the pleadings mentioned.

One of the pretended grounds for such refusal was a notice alleged to have been served upon the respondent by or on the part of the appellant, and stated to bear date on the third of April, 1821, whereby it is alleged that the appellant informed the respondent, that many years' rent was due to him out of the said lands, and requested payment of the renewal fines due thereout, which notice never was served upon the respondent, nor did the same at any time come to his hands, nor did the respondent at any time see the same, until he found it set out in the appellant's answer in the said cause; and even supposing, but by no means admitting such notice to have been served upon the respondent, yet he submits, that according to the terms in which the same is set out in the appellant's said answer, that the said notice is vague and indefinite, and does not specify the sums claimed to be due on foot of the said rent or renewal fines, nor does it insist upon a forfei-

ture of the respondent's interest in the said lands in case the said rent and renewal fines should not be discharged.

Respondent entitled to relief under 19 and 20 Geo. 3, see Appendix.

In consequence of such refusal of the appellant to receive the said rent and renewal fines, and to execute the said renewal, the respondent was advised, that he was entitled to relief under the statute of the 19th and 20th years of the reign of his late majesty King George the Third, passed in Ireland, and entitled "An act for the relief of tenants holding under leases for lives, containing covenants for perpetual renewal," whereby it is enacted, that courts of equity, upon an adequate compensation being made, should relieve such tenants and their assigns against the lapse of time if no circumstance of fraud should be proved against such tenants or their assigns, unless it should be proved to the satisfaction of such courts, that the landlords, or lessors, or persons entitled to receive such fines, had demanded such fines from such tenants or their assigns, and that the same had been refused or neglected to be paid within a reasonable time after such demand; and by which said act it is further provided, that in case the landlord should find any difficulty in discovering his tenant, so as to make a demand on such tenant or assignee, that then, and in every such case, a demand made of the said fine on the lands from the principal occupier of the same, together with notice of such demand, to be inserted, for the space of two months, in the London and Dublin Gazettes, should be considered, to all intents and purposes, a demand within the meaning of said act.

Respondent's bill in the Court of Exchequer for a renewal of original indenture of the 3d March, 1707.

Under the foregoing circumstances, the respondent being so advised, filed his bill in the court of Exchequer in Ireland on the 20th of April 1822, thereby praying an account of the sum due to the appellant on foot of the said rent and renewal fines, and that on payment thereof the appellant might be decreed to execute to the respondent a renewal of the said original indenture of the 3d of March, 1707, in pursuance of the covenant for perpetual renewal therein contained, for the lives nominated in and by the said deed of renewal, so as aforesaid prepared and executed on the part of the respondent, and tendered to the appellant for execution; and praying also, that until the hearing of the said cause the appellant might be restrained by the injunction of the said court of Exchequer from proceeding further in the said ejectment, upon such terms as the court should think fit, which said injunction was afterwards granted by the said court, upon the terms of the

respondent's giving the appellant a consent for judgment in the said ejectment cause, which the respondent accordingly did, and a writ of injunction accordingly issued, which was duly served on the appellant and his solicitor; and the bill so filed by the respondent against the appellant, as according to the practice of the said court of Exchequer is usual in injunction cases, was verified by the affidavit of the respondent.

Appellant's answer.

The appellant answered the respondent's said bill on the 2d of May in said year, 1822, and thereby admitted the said original lease of the 3d of March, 1707, and the covenant for perpetual renewal therein contained; and the appellant by his said answer stated, that the estate and interest of Christopher Fitzsimon, the original lessor therein named, became vested in the late Christopher Fitzsimon, the appellant's grandfather, and that upon his death, which happened on or about the 4th of February, 1812, the appellant having died in the lifetime of his said grandfather.

The Appellant, by his said answer, further admitted the renewal of the said lands of the 5th of March, 1781, so as aforesaid made by Christopher Fitzsimon, Esq. his grandfather, to the said William Burton, the grandfather of the respondent: and that the said Christopher Fitzsimon thereby demised the said lands of Ballinamona to the said William Burton, as the same had been demised by the said original lease of March, 1707, to hold for the lives of his late majesty King George the Third, and of Benjamin Burton and William Burton, both therein named, and for the lives of all such other persons as should be added thereto, pursuant to the said original lease and covenant for perpetual renewal therein contained; and that the respondent, on the death of his father, Benjamin Burton, esq. therein named, became seised of and entitled to a reversion in the said lands of Ballinamona, expectant on the decease of his said grandfather, and that the respondent, on the death of his said grandfather, became seised of and entitled to the said lands of Ballinamona, and all such interest and right of renewal (if any) as the said William Burton might have had therein under the said lease of the 3d of March, 1707, and the several renewals thereof.

The appellant by his said answer further admitted the respondent's residence in Lincoln, and that the said William Burton, his grandfather, had in his lifetime an attorney or agent resident in the county of Carlow in Ireland, who had received the rents of the said lands of Ballinamona for the said William Burton from the occupying

tenants thereof, and had received the same for the respondent since he became entitled to the tenant's interest in the said lands; notwithstanding which the appellant did not, and so it appears from the evidence in the said cause, ever make any application to the said agent, or to any of the occupying tenants of the said lands, for payment of the said rent or renewal fines.

The appellant by his said answer further admitted, that, save by the service of the said alleged notice of the 3d April, 1821, and by bringing of the said ejectment, no rent was demanded for said lands either from the respondent, or his agent, since the death of the said William Burton, his grandfather; and stated that no rent was paid for said lands since the death of the appellant's grandfather, Christopher Fitzsimon, which took place in the year 1812; and that the respondent was not any time, otherwise than by the said alleged notice and ejectment, called upon to pay the said rent and renewal fines.

The appellant, by his said answer, further admitted the tender of the rent and renewal fines so made to him on the part of the respondent, together with the said deeds of renewal so tendered to him for execution; and also admitted the notice accompanying such tender, and the notice of refusal in reply of the 7th March, 1822, both in the pleadings mentioned.

The appellant states by his said answer, upon information and belief, that the alleged notice of the 3d April, 1821, was served upon the respondent by the delivery of a true copy thereof, signed by the appellant, to the respondent's man-servant, at his dwelling-house or place of residence at Lincoln, but no such notice, or any notice to the same effect, was ever served or came to the hands or knowledge of the respondent; nor had the respondent, at the service of such notice, any dwelling house or establishment in Lincoln, the respondent having merely resided there with his mother, as he still does; and the respondent submits, that he could not by the bill so filed on his part controvert the service of such alleged notice, the service thereof having been for the first time alleged by the appellant's answer to the said bill.

The appellant by his said answer stated, on information and belief, that the said notice was served on the 10th April in the said year 1821, by a person of the name of Henry Noble, who is described by said answer as being a process server, but the appellant did not by his said answer,

save upon such information, state his belief that the said notice was so served, nor did he by his said answer at all state his belief that said notice ever came into the hands of the respondent.

The appellant having by his answer, for the first time, disclosed that there was an arrear of rent to the amount of £100 due to him out of the said lands, the respondent, on the 21st May, in the year 1822, caused a tender of the said sum of £100, to be made to the appellant in person at his residence on Bachelor's Walk in the city of Dublin, the respondent having, as before mentioned, previously caused a tender to be made to the appellant of the amount of the rent and renewal fines payable to him by the respondent, on obtaining a renewal of the lease of said lands, but which said rent and renewal fines the appellant successively declined to accept.

It is in evidence in the said cause, that, upon the bringing the said ejectment, search was made by the said Matthew Murphy, who was the land agent of the said William Burton, and is now land agent of the respondent in Ireland, amongst respondent's family deeds and papers for the said original lease of the 3d March, 1707, and that upon said search said lease could not be found, nor did the respondent, or any of those concerned for him, ever see the same, wherefore they are uninformed, save from the said answer of the appellant, as to the nature of the covenant for renewal therein contained; but the respondent submits, that even if the said covenant is such as it is described by the said answer to be, still the respondent is entitled to relief under the said act of Parliament, inasmuch as there was no evidence in the said cause proving to the satisfaction of the said Court of Exchequer, the demand of such renewal fines from the respondent; and even if the said alleged notice of the 3d April, 1821, amounted to a demand within the true intent and meaning of the said statute (which the respondent is advised it did not,) the said Henry Noble has merely sworn, that on the said 10th day of April he served the respondent with the said notice at his house at Lincoln, by delivering a copy thereof to the respondent's man servant, but the said Henry Noble has not ventured to mention the name of such servant, or to swear that he told him the nature or purpose of such alleged notice, or that he desired him to give the said notice to the respondent; for which reason (amongst others) the Barons of the said Court of Exchequer expressed an unanimous opinion that

the said evidence was unsatisfactory, and that in similar cases the notice of demand should be personal, or at least that it should appear in the progress of the cause (which it did not in the said cause between the appellant and respondent) that such notice had actually come to the hands of the person for whom it was intended. And it is not in evidence in the cause that any such demand was made upon any occupier of the said lands, or that any notice of such demand was inserted in the London or Dublin Gazettes pursuant to the said statute.

It is in evidence in the said cause, that the respondent was born and educated, and that he continued to reside at Lincoln down to the death of the said William Burton, with the exception of some occasional visits which the respondent made for short periods to his said grandfather in Ireland when the respondent was a boy.

It is also in evidence in the said cause that the said Matthew Murphy was the agent and receiver of the rents of the said lands of Ballinamona, from the year 1813 to the time of the death of the said William Burton, the respondent's grandfather, and that the said Matthew Murphy was continued as such agent and receiver to the respondent after the death of his said grandfather, and that Thomas O'Mara, Esq. who had intermarried with the mother of the appellant, managed the affairs of the appellant during his minority, and knew of such agency of the said Matthew Murphy to the said William Burton, and to the respondent, successively; and that the said Thomas O'Mara occasionally resided with his wife and family contiguous to the said lands, and that there were frequent opportunities for the appellant and those concerned for him to demand from the said Matthew Murphy, as such agent, the rent and renewal fines of said lands, but that there was not any demand whatsoever made on the said Matthew Murphy for or on account thereof, and that he had not any notice of such claim up to the bringing the before mentioned ejectment.

The respondent has been at all times ready since said decree, from which the appellant has appealed, was pronounced, to submit thereto, and to pay the rent, renewal fines, and costs, decreed to be paid by the respondent to the appellant, when the same should be ascertained by the proper officer of the said court, as directed by the said decree; but the appellant, and those concerned for him, have refused to ascertain the said costs, and to accept of the said rent

and renewal fines, and the respondent therefore humbly hopes that the said decree will be affirmed with the costs to be incurred, by the respondent, touching the said appeal, &c.

Judgment of the Irish Exchequer reversed by the Lords.

Judgment was given by the Lords on the appeal in this case of *Fitzsimon* v. *Burton* on the 15th March, 1826, and thereby the decree of the court of Exchequer in Ireland, which had been made in favour of the respondent, was reversed.

Judgment by Lord Redesdale.

The following is the judgment as given by Lord Redesdale.

Lord Redesdale.—I will take this opportunity of calling your lordships' attention to the case of *Fitzsimon* v. *Burton*, which was argued before your lordships a few days ago. My lords, it appears in that case, that in the year 1707 a gentleman of the name of Fitzsimon granted a lease of lands in a place called Ballinamona to Henry Aston at the rent of £10 a year for three lives, with a covenant for a perpetual renewal in these words: "And the said Christopher Fitzsimon doth hereby for himself, his heirs and assigns, covenant, promise, and agree to and with the said Henry Aston, his heirs and assigns, that upon the death or failure of any of the aforesaid lives of the said Edward Aston, Nicholas Waddington, and John Faulkiner, or any of them which shall first happen, and he the said Henry Aston, his heirs and assigns, paying or causing to be paid unto the said Christopher Fitzsimon, his heirs or assigns, the full and entire sum of five pounds as herein is reserved, over and above the annual rent herein before reserved, within six months next after the failure of such life and upon the nomination of the life of any other person by the said Henry Aston, his heirs or assigns, at his or their request, to be put and inserted in the place and stead of the person so happening to die as aforesaid, that then the said Christopher Fitzsimon, his heirs or assigns, shall and will within six months after the death of such person so happening first to die as aforesaid, add and insert to the time and term of the said lease, the life of such person so nominated in the place and stead of such person so happening first to die as aforesaid, which life so added and inserted is to be endorsed on this lease, or to be written on a deed, label, or parchment, to be affixed to this lease for that purpose, and in like manner from time to time successively for ever upon the failure of every several life in this lease now nominated, or hereafter successively to be nomi-

Renewal clause.

uated as aforesaid, and upon the like payment of the entire sum of £5 sterling, as herein is reserved over and above the annual rent herein reserved within six months next after the failure of every other such several life, and upon the nomination of any other life successively, in lieu of every several life so failing as aforesaid."

A very strong negative clause.

Then there is a proviso, "that if it shall happen upon the failure of any life herein above nominated or hereafter to be nominated, the said Henry Aston, his heirs and assigns, shall not or do not pay unto the said Christopher Fitzsimon, his heirs and assigns, for every such life so failing as aforesaid, the said full and entire sum of £5 over and above the annual rent aforesaid, within six months after the failure of every such life as aforesaid, and also shall not within the said space of six months after such failure nominate the life of one other person in lieu thereof, to be added to the time and term of this demise as aforesaid, that then it shall and may be lawful to and for the said Christopher Fitzsimon, his heirs and assigns, for ever hereafter to deny and refuse the said Henry Aston, his heirs and assigns, to add, insert, nominate, or put any other life or lives to the time and term of this demise other than the life or lives which shall be then in being, and then and in such case also the said demised premises after the determination of such lives which then shall be in being, shall be and remain unto the said Christopher Fitzsimon, his heirs and assigns; and that then this present deed and demise to determine and be utterly void, to all intents and purposes, as if these presents had never been made."

My Lords, it is perfectly clear from the form of this covenant, that there was a great anxiety on the part of Mr. Fitzsimon to prevent any negligence on the part of his tenant in naming a new life when a life should drop, and the deed itself certainly provides, so far as that deed is permitted to operate, a sufficient remedy in words. This lease having been executed in 1707, it is extremely probable that Mr. Fitzsimon was aware of a practice which had prevailed in the courts of equity in Ireland, to relieve against the lapse of time in naming proper lives in leases of this description, and that being aware that these words were inserted for the purpose of compelling the tenant within a proper time to name a life, and that if that life was not so named then there would be an end of the lease which had been granted.

Probably intended to exclude from a renewal, if fines not paid.

Non-payment of rent from 1812, considered by Lord Redesdale an important circumstance.

My Lords, lives were from time to time named, and at last a renewal was made on the 5th March, 1781, by Christopher Fitzsimon, the grandfather of the appellant, to William Burton, of Burton Hall, in the county of Carlow, who became entitled to hold, all and singular, the premises, for and during the natural lives of Prince George, then Duke of Cornwall, and afterwards King George the Third, and of Benjamin Burton and William Burton, the sons of William Burton, of Burton Hall. My Lords, those lives have all been long gone, his late Majesty being the survivor by some years. The interest in this property of Mr. Fitzsimon, the original lessor, came to the father of the present Mr. Fitzsimon, and afterwards to Mr. Fitzsimon the appellant, he being then a minor. It appears that from the time that Mr. Fitzsimon, the appellant, became possessed of this property, which I think was on the 4th of February 1812, no rent whatsoever has been paid by the tenant. Now, my Lords, that is a very important circumstance in this case, in my judgment, because the tenant must very well know that he was bound to pay a rent. Mr. Fitzsimon, the appellant, was a minor, and it appears from the evidence in the cause, that the Burton family had an active agent then resident in Ireland, who dealt with this property, and it is also clear that all the title deeds were in the hands of this agent, who was therefore capable of resorting to those title deeds, and discovering under what title it was that this property was held by the Burton family.

The three lives gone: service of notice under the Tenantry Act, on the servant of the respondent at the house of his master, in Lincoln, where he resided.

My Lords, Mr. Fitzsimon, the appellant, having attained the age of twenty-one, I think in the year 1821, finding that there was a large arrear of rent due from these lands, that there had not been any rent paid since he became proprietor, nor for some time before, he set about inquiring who were the persons to whom they were leased, and whether any arrears had become due; on inquiry he found, my lords, that every one of the lives had expired and was gone; finding this, he caused a notice, dated the 3d of April, 1821, to be served on Mr. Burton the respondent, and that notice is a very important circumstance in this case. The manner in which it was served was this; Mr. Fitzsimon sent a person over from Ireland to Lincoln, where Mr. Burton lived, and according to the evidence given by that person, he delivered that notice to a servant of Mr. Burton, at the house in which Mr. Burton was then resident in Lincoln. It seems that the house was his

mother's house, but it is not disputed that he was there resident.

My Lords, the courts in Ireland having been in the habit of relieving from mere lapse of time in cases of this kind, a great deal of litigation has taken place upon the subject, and I have been told in Ireland when I was in that country, that every forty or fifty years every lease of this kind upon the average throughout Ireland, was the cause of some suit; that this tenure in Ireland produces some suit generally for the benefit of the Court of Chancery or the Court of Exchequer in that country every forty years.

An equity suit on each lease under this tenure every forty years.

My Lords, an act was passed in the 19th and 20th years of the reign of his late Majesty, which was produced by these circumstances: My Lord Lifford, in the Court of Chancery in Ireland, had decreed a renewal in a case in which the House of Lords here, which then entertained appeals from decisions of the courts in Ireland, were of a contrary opinion, and they reversed his Lordship's decree. My Lords, that case it was my duty when in Ireland to review very minutely, and upon what principle my Lord Lifford could have made that decree I cannot conceive, for it was a case of the grossest fraud that perhaps ever existed; it is scarcely possible to conceive a case of grosser fraud. The man who had the benefit of the lease was the agent for the family to whom the reversion belonged; he was calling perpetually on all the other tenants to renew the leases, but he took care not to call upon himself to renew his own lease; that was a circumstance furnishing in my mind a sufficient ground for reversing Lord Lifford's decision.

My Lords, this caused a great deal of alarm in Ireland; it was supposed that what was called the old equity was abridged, and an act was passed which has been since the guide to all the courts in their decisions. That act of parliament says, that the courts on an adequate compensation being made, shall relieve tenants and their assigns against lapse of time if no circumstance of fraud be proved against such tenants or their assigns, unless it be proved to the satisfaction of such courts, that the landlords, lessors, or persons entitled to receive those fines, have demanded such fines from the tenants or their assigns, and that the same have been refused or neglected to be paid within a reasonable time after such demand. Then there was a proviso in the act, that if the landlord shall find a difficulty in discovering

Omission of the statute in not having provided some convenient mode of making the demand, where the tenant may be known but out of Ireland. Thereupon the statute should be construed strictly, in favour of the landlord in such case.

the tenant, a demand made upon the land from the principal occupier, and notice of that demand made for two months in the London and Dublin Gazettes, shall be sufficient; but this applies as your lordships see, only to the case where the landlord shall not discover who was the tenant.—In this case Mr. Fitzsimon had discovered who was the tenant, and he did not content himself by taking any other means of making a demand but sending a person to England for the purpose of making that demand. Now, my Lord, this, permit me to say, is no small hardship. Here is a fine of five pounds for which a landlord is to send a special messenger over to England to make the demand, without which it is conceived he cannot proceed at all. My lords the expense of this would, I fancy, cost more than the five pounds, and I cannot say that if this act is not to be construed with a very considerable degree of strictness, it would be the most unjust act that was ever passed, for it might have the effect of depriving every landlord of this description of the rights he has, except under very special circumstances, and more particularly in the case of a proprietor residing not in Ireland.

Another cause for like strictness is another omission in the statute, in not providing for the preservation of evidence of the demand, given on the first or second life.

My Lords, there is another circumstance which it seems to me has been a little overlooked by the legislature in passing the act. It was passed, I believe, at a time when a great degree of irritation existed, and it has not at all provided for this unfortunate case. Here are three lives, one life drops, the landlord makes his demand. Here are two other very good lives; they may last twenty or thirty years, and this demand may be totally lost. Now I think the legislature, when they passed this act, should have made some provision as to what should be done under such circumstances. However they have not. I take it therefore that it is an act that ought to be construed strictly—it is an act infringing most clearly and distinctly on the contracts of parties, and it infringes most clearly and distinctly in this case on the contracts of parties, for it is specially contracted between them that if a demand shall be made not only the covenant shall not bind, but that there shall be a total end of all the dealings between the parties, that is to say, there shall be an end of the whole if the fine is not tendered within the time of six months after the dropp n gof the life.

The tenant generally knows the drop of the

My Lords, under these circumstances, therefore, I am sure that this act ought to be construed with a considerable degree of strictness in respect of the tenant, and with a

considerable degree of liberality in respect of the landlord, for the tenant must know under what title he holds the land, he must in general very well know who are the lives whom he has nominated, whereas the landlord may not, he may know from the documents which he has, the names of the persons so nominated, but they are generally of the family of the lessee, and therefore may be persons wholly out of his cognizance; here one of the lives was that of his Majesty, a person perfectly well known to all the parties by circumstances to have died; the other two lives were sons of Mr. Burton, the grandfather of the present respondent, who renewed the lease; he must have known the fact, that his two sons were dead; he must have known the fact that he held his estate for the lives of his two sons, when he himself was the person who had renewed the lease. My lords, with respect to him, therefore, the negligence appears to me manifestly gross.

life, the landlord not; therefore the statute should be construed strictly as to the tenant, and liberally as to the landlord.

My Lords, there is another circumstance which ought not to be overlooked in this case, which is, that this property was under settlement, that Mr. Burton, the grandfather, was only tenant for life, and that it was entailed on the present Mr. Burton. But what has the landlord to do with that. You must consider the person who is the tenant for life as the person who represents the estate; he was the person who was bound to pay the fine, and if he did not pay the fine, the court must look to him and to his neglect: it may be unfortunate for the person to come after him.

The tenant for life represents the estate, and is bound to pay the fine.

My Lords, if this case had stood independent of this circumstance of the notice which was served on Mr. Burton, as alleged by the appellant, I should say, that if that notice had not been, still this was a case, (after the lapse of time which has occurred, all the lives having ceased, two of them being of the family, and the third, that of his Majesty, whose death must have been notorious, all the lives having ceased before any application was made for a renewal,) that this was a case of gross neglect, and that, therefore, it cannot go under the description of mere neglect, which are the words of the act.

There is a case for the appellant, if he had served no notice.

But, my Lords, Mr. Fitzsimon served this notice in the manner in which I have stated, and it seems to me, the Court of Exchequer have proceeded upon this ground, that Mr. Fitzsimon had passed by all these circumstances, that they were cancelled, this service of notice being to be considered as a waver of the previous objections; that when

Great difficulty if personal service should be deemed necessary.

Mr. Fitzsimon thought fit to give him this notice, he meant to say, "I am ready to take the fine if you will give it me now," and therefore, it was a waver certainly. But, my lords, the court of Exchequer says, this was not the service of a notice. My Lords, the act of parliament does not say it shall be served personally upon the party, and what extreme difficulty would there be if it was held that it must be a personal service.

The respondent declined to cross-examine the server of the notice, or examine his own servant.

Therefore the service sufficient.

My Lords, there are other circumstances. Mr. Burton having filed his bill, for the purpose of compelling a renewal of his lease, he called upon Mr. Fitzsimon to state by whom he served this notice, understanding, I suppose, that Mr. Fitzsimon said he had given a notice. Mr. Fitzsimon states that it was served by A. B. Then the when and the where and every circumstance being at issue, this witness is examined, and he proves the service of the notice, that it was by leaving it with a servant of Mr. Burton, at the house where, Mr. Burton lived. In the first place, if Mr. Burton doubted the truth of the man's evidence, he ought to have cross-examined him: if he meant to say, "though this notice may have been served, it never came to my hands;" he should have examined his own servant: "Did you give that notice to me; if not, why did you not give it me?" But no examination of that kind takes place, my lords; I take it therefore, your lordships must hold, that this notice was served upon Mr. Burton, and sufficiently served.

The appellant brought his ejectment, and that surely was notice. The respondent took defence, and that was a denial of his landlord's title; and an important feature in the case.

My Lords, besides all this, this notice having been served I think on the 3d of April, 1821, Mr. Fitzsimon receiving no answer, he on the 17th of January, 1822, nine months after the service of this notice, brought an ejectment. Now, my lords, what did Mr. Burton do upon that ejectment? That ejectment was surely notice to him: he was bound then to pay the fines, but instead of doing that, he took defence to that ejectment. By his defence to that ejectment, he denied the right of Mr. Fitzsimon to the land: he insisted upon it as his own land, and that does appear to me to be a very important feature in this case. It is clear, rent had not been paid for fifteen or sixteen years. If it had not been paid for twenty years, he might have stated that the jury ought to presume there has been a surrender. My Lords, taking defence to that ejectment, I say was a declaration that he would not pay the fines. Finding that he could not succeed in this defence, he then in March files a bill for the purpose of compelling a renewal.

Now, my Lords, the question for your Lordships, therefore, is, whether under the circumstances of this case, the court of Exchequer have done right in decreeing a renewal: they have certainly treated the notice as not a sufficient notice; I confess, my Lords, it does appear to me to be a sufficient notice, and a notice which must be considered as proved to have been served upon Mr. Burton, because if it was not served upon him, Mr. Burton had ample opportunity of cross-examining the witness, who swears to the service, and also of examining his own servant, or any other person, to show either that he was non-resident in that house, (but that indeed is not disputed, he only says, it was his mother's house, and not his own,) or to show that it had never come to his hands—to show in short some sort of excuse.

The service of the notice considered insufficient by the court of Exchequer.

My Lords, under these circumstances it does appear to me, here is wilful neglect. Now, my lords, several cases have occurred since this act of parliament, which have come before the courts of Ireland; there was one case which came before my Lord Clare, who was perfectly acquainted with the circumstances under which this act passed; he did in that case decree a renewal upon this ground, that the parties were in constant treaty, and that the landlord made a mistake with respect to the life, and insisted that the life in the lease was a man who had died a great many years ago, when the man who actually was in the lease had not in fact died, and that this was in dispute between the parties for some time; he considered that as a circumstance which entitled him to decree against the landlord in that case. But he stated, in his judgment upon the subject, what he conceived to be the true construction of the law of the 19th and 20th Geo. 3.; he said it is impossible to draw an exact line in all cases, for that which is the correct line in one case, may not be in another; but, he said, I will proceed by analogy to other acts of parliament, which have limited six months, and I shall hold, that, generally speaking, six months must be the boundary of the time.

This a case of wilful neglect.

My Lords, in cases which came before me, I held that that was the line which ought to be drawn; but I held also, that if there was a great shuffling on the part of the tenant, which there was, particularly in the case of *Jackson* v. *Saunders*, which came afterwards by appeal to this house, though the lapse of time between the end of the treaty and the time when the landlord said he would have nothing to

The tenant must not play fast and loose with his landlord.

do with it, was not quite four months; the landlord was there entitled to say "you have trifled with me so long I will have nothing more to say to you:" and this house affirmed that judgment, upon this ground; that the tenant was not to play fast and loose with the landlord, but that he was to use all diligence after he had notice, for it was mere neglect on his part which was to be indulged, but that that indulgence was not to be extended to a case in which he attempted to delay his landlord, when he knew the circumstances of the case and the right of his landlord.

I think that the notice must be taken to have been served upon Mr. Burton's servant at Lincoln; it is sworn to positively by the person who says he served it, and that evidence is not disputed. I hold that personal service is not within the meaning and intent of this act of parliament; the act of parliament does not indeed say, that notice shall be served, but the words of the act are these: "the landlord or person entitled to the property at the time having demanded such fines." Why, my lords, for the purpose of a demand of that description, is it not sufficient to give a formal notice, making the demand and giving it to the servant of the party at the place of his actual residence? I hold, therefore, my Lords, without resorting to any other circumstance of this case, that notice has been sufficiently given, that the demand has been sufficiently made and sufficiently proved; and that being sufficiently made and sufficiently proved, and no step taken on the part of Mr. Burton in consequence of that demand till very nearly a twelvemonth after, within a few days of the twelvemonth; and Mr. Burton, on the contrary, taking defence to the ejectment when the ejectment was brought, and therefore denying the title of Mr. Fitzsimon, if he had any title whatever to this property; under these circumstances I am of opinion, that this was a case in which Mr. Burton ought not to have been relieved, but that the bill ought to have been dismissed.

Without resorting to other circumstances the material part of the case is, that there has been a sufficient demand, sufficiently proved.

My Lords, one circumstance appears to me that the court of Exchequer have completely overlooked; Mr. Fitzsimon had no remedy but by bringing an ejectment; he could not have had an effectual remedy but by bringing an ejectment; and they have not given him the costs of the ejectment. It might be said that he might recover these costs at law; but he cannot recover those costs at law, because he is restrained by the injunction from taking out judgment at law. The material part of the case, however, I

think is, that there has been a sufficient demand made sufficiently proved, to controvert that evidence; and that therefore in this case the bill ought to have been dismissed, and of course ought to have been dismissed, if at all, with costs. With respect to this appeal the judgment of the court being to be reversed, your lordships will not of course give the party the costs of the judgment in the court below, but the costs of the bill in Equity I apprehend ought to be given to him, because the bill ought to have been dismissed, and I think ought to have been dismissed with costs.

Lord Eldon, (Chan.) My Lords, I have thought it desirable, considering the nature of the case before your lordships, that the noble and learned lord who formerly held the great seal of Ireland, should state his opinion first upon the case. It appears that the last lease of this property was made in the year 1781. In its contents it is much shorter than the instrument of 1707; but there is a reference throughout to the deed of 1707; therefore when you come to ask, what is the law with respect to the deed of 1781, you must look at the deed of 1707, as that by which it is necessarily to be construed.

Cases relieveable under the Tenantry Act, are those of mere neglect.

This is not such a case.

My Lords, the question which this cause has brought before the court of Exchequer in Ireland, depends entirely I apprehend upon the effect of what was the law before the statute of the 19th of the late king, which is called the Tenantry Act, (and by the word law, I mean law and equity, and the effect of the Tenantry Act upon such an instrument as this deed of 1707, in the actual circumstances which have taken place between the landlord and tenant,) in this case, looking to the covenants in the deed of 1707, I think I may venture to state with reference to the words of the Tenantry Act, which is an act to relieve the tenants in the cases which that act itself expresses to be cases of mere neglect, that it be as impossible to say that this was a case of mere neglect, as it would be to predicate any thing of any deed to which that act refers.

My Lords, the demise is made for three lives, a yearly rent of £10 is reserved in equal portions at particular periods. The remedies are, first, distress, and if there is no sufficient distress, then a right of re-entry; but in a part of the instrument subsequent to the provisions as to the right of re-entry on non-payment of rent had, there is this covenant, "the said Christopher Fitzsimon doth hereby for him, his heirs, and assigns, covenant, promise, and agree, to and with the said Henry Aston, his heirs and assigns;" and give me leave to

say that these words must be construed as infused into the indenture of 1781, and the act called the Tenantry Act bears date about the 19th or 20th year of George the 3d; your lordships will very easily be able to give the date of that; "that upon the death or failure of any of the aforesaid lives of the said Nicholas Waddington and Faulkner, or any of them which shall first happen, and he the said Edward Aston, his heirs or assigns, paying the full and entire sum of £5, as herein is reserved over and above the annual rent herein before reserved within six months next after the failure of such life, and upon the nomination of the life of any other person by the said H. Aston, his heirs and assigns, at his or their request to be put and inserted in the place and stead of the person so happening to die as aforesaid, that then the said Christopher Fitzsimon, his heirs or assigns, shall and will within six months after the death of such person so happening first to die as aforesaid, add and insert to the time and term of the said lease, the life of such person so nominated in the place and stead of such person so happening first to die as aforesaid, which life so added and inserted is to be endorsed on this lease, or to be written on a deed, label, or parchment, to be affixed to this lease for that purpose, and in like manner from time to time successively for ever upon the failure of every several life in this lease now nominated or hereafter successively to be nominated as aforesaid, and upon the like payment the entire sum of £5 sterling as herein is reserved, over and above the annual rent herein reserved within six months next after the failure of every other such several life, and upon the nomination of any other life successively in lieu of every seseveral life so failing as aforesaid, that then the said Christopher Fitzsimon, his heirs and assigns successively, shall and will, within six months next after the failure of every other life so nominated as aforesaid, add, and insert to the time and term of this lease from time to time for ever the several life or lives of such person or persons to be nominated in the place and stead of the life or lives of the several person or persons successively happening to die as aforesaid, which several lives so to be added and inserted successively are to be endorsed on this lease, or written in deed, label, or parchment affixed thereunto as aforesaid."

Now, my Lords, the plain and obvious construction of this, unless the meaniug of it is perverted entirely by the act of Parliament which passed in the 19th year of King

George the Third, is this; and the reasoning upon it is the same whether the sum to be paid be the small sum of £5 or the sum of £500, that where the payment can be made upon the failure of each successive life, that shall be done. Cases certainly may occur in which that cannot be done, as if the three noble lords sitting opposite me, Irish lords, happen to be named in one lease, and in going over in a steam packet from Liverpool to Dublin, they should happen to be cast away at the same time, there have been questions even in such cases which of the three lives has come first to its close. I recollect a case in which a father and his son being drowned, that question has arisen; and another, in which a father and his son being hanged at the same time, issues were directed to try which of them first died, by drowning in the one case, and by hanging in the other, for it might not be of necessity that they died at the same time; but unless in the case of some unforeseen circumstances as that where all the three lives expired at once, the covenant in this lease requires that upon the failure of each successive life, application shall be made for the insertion of another life, and when the old doctrine of equity about compensation is supposed to have been entertained, give me leave to say that that doctrine was carried to a most ridiculous extent; it appears to have been founded upon this sort of fallacy, that you could by compensation make good what you ought to have paid for the nomination of a life. Now it is quite obvious that when a life is added to the first instrument it ought to be added before the compensation is paid, probable long before. In the interval two or three lives might have expired, and it is not therefore a subject of such accurate calculation as that men's covenants should be construed by it.

When three lives are suffered to expire, can that be called a case of mere neglect? It is the duty of the tenant in England, to take care that he pays the rent.

Now what has been done in Ireland, because I hold myself bound to say that we are acting under a statute which speaks of a case of mere neglect. If instead of adding one life to two lives, or in certain cases two lives to a third, having suffered all the three lives to expire, when you therefore call upon the landlord to grant an entire new lease for three lives all at the same time, can that be called "a mere neglect?" Look at what is called "mere neglect" in this case, taking the lease of 1781 into our consideration, and it appears that for a series of years no rent had been paid under that lease. This bill was filed so far in the present century as the year 1822, and it is now attempted to say, what? why to say that non-payment of rent during two of

of those lives, or three of those lives, is on the part of the tenant a mere neglect. Now, my lords, it is always understood, in this country at least, that it is the duty of the tenant to take care that he pays to the landlord the rent that is due to him.

There is then in a subsequent part of this, a very beneficial clause, that if there is a fine due as well as rent due, if they are not paid within six calendar months the landlord shall have a right of re-entry upon the estate, and in that case he may recover his rent as well as his fine, though there is a distress upon the premises, which tends therefore to show that when this statute speaks as you will see by and by, it speaks of nothing but fine, for the word rent is not mentioned in it from the beginning to the end; the laches and neglect, or the wilful default of the tenant to pay his rent, are made the subject of compensation, much in the same way as the statute is supposed to have given compensation in the case of fines.

Such being the original lease, an indenture was made in 1781, and that indenture was for three lives, the life of his late Majesty, King George the Third, and Benjamin Burton and William Burton, in the place and stead of two lives, Nicholas Waddington and Susannah his wife.

The statute passed in the 19th and 20th of the late king, is expressed in these words, and I take the liberty of saying, (whether it would have been conformable to the Irish precedent or not, I do not know,) but if the matter had been brought into the court in which I have the honour to sit, I certainly should not have had the least hesitation whatever to have said, that if the appellant had not served the notice which has been referred to, it would have been utterly impossible for the respondent to have brought this case within the meaning of this act of parliament. And here I will just repeat again an observation I before made upon the meaning of compensation with respect to the non-payment of a fine, for not putting in a life. The recital of the act is in these terms:

"Whereas, great part of the lands in this kingdom are held under leases for lives with covenants for perpetual renewals upon payment of certain fines at the times therein respectively mentioned for each renewal. And whereas from various accidents and causes, such tenants and those deriving under them have frequently neglected to pay or tender such fines within the times prescribed by such covenants after the fall of such lives respectively, and whereas

many such leases are settled to make provision for families and creditors, most of whom must be utterly ruined if advantage shall be taken of such neglects, which will occasion much confusion and distress in the kingdom; and whereas it has been for a long time a received opinion in this kingdom, to which some decisions in courts of Equity and declarations of judges have given countenance, that courts of equity would in such cases relieve against the lapse of time upon giving an adequate compensation to the persons to whom such fines were payable, or their representatives." So that if a lease had been granted during the life of A, during the life of his son B, and during the life of his son C; A, the respective tenants for life at the deaths of A and B, who have not received the fines of their estate, are to receive nothing; but the tenant for life on the death of the third person who dies is, according to this, to receive the whole, though he was not entitled to two-thirds, and this not of fines only but of rent too. Now I should be glad to know how, first of all, it ever came to be thought that a tenant who through the life of his landlord and the life of his landlord's eldest son, and the life of his landlord's second son, the three *cestui que vies*, and neither paid a fine nor rent during the first year, nor any subsequent year, but chose to go on as this tenant has done for twelve or fourteen years, (and upon the same principle he might have gone on for twenty years,) could after that come into a court of Equity to say, this is all a mere neglect: it is to be sure a neglect, in one sense of the word it is a very great neglect, that he should neither remember the contents of his lease, nor his own situation in respect of it, for so many years together. But, my lords, is it a mere neglect? My lords, the words of the act are, "and to the end that such interests may not be defeated by a mere neglect when no fraud appears to have been intended." Now I should construe these words to have meant this, that fraud shall not be presumed to be intended if there is no evidence of fraud, but mere neglect, but to say that where there *is* a positive and clear neglect, the statute which is aimed at mere neglect is to be so construed as to do away with the effect of positive neglect, obvious neglect, which a man cannot be guilty of without feeling it; and that in additon to that there should be some circumstance of positive fraud attending it, appears to me to be a construction very different from what was originally intended to be given to this act.

My Lords, there is another observation which is extremely material in these cases; when you come to ask yourselves what is mere neglect, I say it is fair to look at the contents of the lease, because the provisions of the lease are such in their nature as will put one in mind from time to time, and shew what it is our duty to do; a man who possessed the instrument under which he held the land must have known his duty; but he seems to say, I did not choose to discharge my duty; how can it be said that that is a mere neglect, when the very nature of the instrument under which he holds reminds him of what his duty is. I must confess it appears to me that it is impossible to say that if a man pays neither fine nor rent, and lets three lives expire, neither paying fine nor rent, he is within the meaning of this act. If he does pay all the fines and all the rent to the man who happens at the moment not to be entitled, he puts into his pocket that which should have been paid to two others. And the question your lordships will have to ask yourselves is not merely the question, what is the nature of the contract between the lessor of to-day and the lessee of to-day? but what was the nature of the contract between the lessee and the person who was lessor when the first fine ought to have been paid, and the person who was lessor at the time when the second fine ought to have been paid, and when it might turn out on an examination of the circumstances that happened at those periods, that there had been such conduct with respect to the first, and the second, so to make it impossible to rely upon this as a mere neglect.

To add a life to a life, should refer to an existing and not an expired estate.

My Lords, I take the liberty of making these observations, because knowing the length to which the decisions of the court in these cases have gone, I cannot bring myself to go one iota farther than such decisions have gone; and, my lords, here is one very material thing to be attended to when we talk of adding a life, the obvious intent and meaning of the language is, that we are meaning to add a life to a life, that is, with reference to some estate which has existence at the time; whereas this lease had expired. During the whole three lives the estate had been enjoyed, and the persons who now assert their right to add a life without any title whatever. Under such circumstances I think I should have had infinite difficulty to satisfy myself in my view of the duty of a court of Equity, if the lessor had not himself opened the subject by giving that notice, that that title ever could be revived by the application of the tenant. The

very circumstance which I have stated I think ought to have concluded the tenant; he had the lease in his hands, and he could not but know what was in the lease, and it is perfectly fair to assume that all those who claim under him knew what was in the lease. They knew of the neglect during three generations, and if that does not destroy the right of the tenant to claim a revival of his interest, I do not know what can.

The demand made sufficient; and the ejectment a sufficient demand; and three months thereafter a sufficient default.

But, however, my Lords, it does not rest there. The lessee was a person living at Lincoln, and it appears in evidence that the landlord sent over a notice to him, desiring him to be so good as to pay the rent and the fines which were due. It is proved by a servant of the name of Henry Noble that he carried that notice to the house of this gentleman at Lincoln, and that he delivered that notice to a servant who came to the door of that house; service at the house in most cases is notice to the party, and it is probable that that notice reached this gentleman, and it is the more probable, because it is not denied; here he might have cross-examined Noble, or he might have examined his own servant, to prove that though this notice was delivered at his house, that though it was put into the regular channel of conveyance to him, it had not for some reason or other reached him; however, he does not think proper to do that. But then after that he suffers time to run on from the month of April, 1821, to the month of January, 1822. The landlord then brings an ejectment. Now if that notice came into his hands, and it ought to be presumed to have come into his hands, of which I say there is sufficient evidence, unless you say that personal service is requisite, in which I cannot agree, the consequence of that was, that there was a non-payment of rent form April, 1821, till January, 1822, and it would be a pretty extraordinary construction to put upon a lease which requires payment within six months after that payment is due, if upon this statute which says that the tenant shall be relieved if after demand he pays it within a reasonable time, though the lease itself stipulates six months as the period, you should say that the payment was not withheld for more than a reasonable time, when it was withheld for three months more than the six months which was the stipulated period.

My Lords, there can be no doubt in the world as it appears to me that this ejectment was an ejectment brought upon the want of title, by a man who had stated in his no-

tice, that he was willing to accept what was due to him, that would have amounted to a waver of his right to bring an ejectment, if that willingness had been met by the same willingness on the other side; but instead of that, he adversely defends the ejectment, which is, in other words, denying that there is either a legal or an equitable tenancy existing at that time between them. My lords, upon the whole I am of opinion that the decree of the court of Exchequer cannot stand; stating again that I have not the vanity or presumption to think of disturbing the cases that have been decided, at the same time that I do not feel it to be proper to carry the decisions further than those cases have already gone, without going further into the case; I feel it to be my duty to state to your lordships, that I most fully concur in the opinion which has been expressed by the noble and learned lord, that this judgment should be reversed, as I am of opinion the bill of the respondent ought to have been dismissed with costs.

Judgment reversed.

Counsel for the Appellant: *Hart, Sugden, and O'Connell.* For the Respondent: *Shadwell, Pennefather, and G. Moore.*

Observations on the Case of Fitzsimon v. *Burton.*

Sufficiency of the demand of the fines the material point of difference in this case, between the House of Lords and court of Exchequer.

In this case the House of Lords reversed the decree of the Exchequer in Ireland. The material point in the case was, whether the demand was sufficient, and sufficiently proved. It would seem that the Barons were of opinion, that the demand was insufficient; in which respect the House of Lords differed from that court.

The dicta thrown out by Lord Eldon in this case, "whether, where the three lives have been suffered to drop, a life can be added, where there is nothing to add to; and whether the suffering of the three lives to drop, can ever be considered a case of mere neglect;" have produced a great sensation in Ireland, as leading to a conclusion, so far as the authority of that noble and learned lord, that in the case of three lives having been suffered to drop, a renewal should not be grantable to the tenant. There is no doubt, that this treatise supplies many authorities to the contrary of that position, *vide ante* 136 to 140, and the cases there referred to; nor can it be denied that there are authorities on the other side, to which the recent opinion of Lord Eldon, although but a dictum, is an important

accession. The Editor presumes to say that this dictum, is dehors the question on which the reversal of the decree of the Exchequer turned. There is no doubt that the drop of the three lives will be always an important ingredient in the merits of the case; the question is, will that circumstance exclude the tenant altogether? On this subject there are authorities both ways, and as the Editor has referred to them already, he feels it unnecessary in this place to make further observations thereon.

Renewals two-fold, limited and perpetual.

Renewals are two-fold, limited and perpetual; the former is where the renewal is circumscribed to a certain number of years; or a certain life or lives: the latter, is where words are used tantamount to the phrase "for ever," or "from time to time and at all times;" or denoting it to be the intention of the parties, that the estate granted should be a perpetuity. The legal doctrine on this point, namely, what words in a deed shall create a renewal limited or perpetual; and what principles of construction should be applied to the words of a deed, in the determination of that question; together with a view of the cases on that subject, are given in a condensed and perspicuous manner in the argument for the appellant by Mr. Prime Sergeant Fitzgerald and Mr. Saurin, in the case of *Earl of Inchiquin, Duke of Leinster*, and *Earl of Shannon* v. *Burnell*, 3 *Ridg.* P. C. 382.

The legal view taken on this subject by the counsel for the appellants, was abundantly sanctioned by the event of the appeal. The decree of Lord Clare for a renewal to the respondent Burnell, having been reversed in the Lords', on the motion of the Chancellor himself, after a reference to the twelve judges, who were unanimously of opinion in favour of the appellants.

What shall be deemed a covenant for perpetual renewal.

And for the subsequent law on the same subject, namely, as to what shall be deemed a covenant for perpetual renewal, *vide* the case of *Courtney, Kenny*, and others, v. *Forde* and others, *Batty's Report*, 534; and the case of *Lord Clermont* v. *the Marquess of Downshire*, *ib.* 541.

APPENDIX.

DUTY OF RECEIVER IN RESPECT TO LEASES ON LIVES RENEWABLE FOR EVER.

Duty of receiver in respect of renewal leases.

THE preservation of the title to the estate forms also a prominent feature in the duty of a receiver; wherefore, he should inform himself of the tenure under which the entire and every part is held. A considerable portion of property in this country is held under leases for lives renewable for ever, and under leases from ecclesiastical persons, or corporate bodies, with power to renew, or under leases with *toties quoties* covenants for renewal, through which most valuable interests are derived. Where any of the lives have dropped, or the interest may otherwise be likely to expire, as the benefit of renewal may be lost, waived, or prejudiced, by the laches of the parties or receiver, it becomes frequently of the greatest consequence, in order to preserve such interest, that renewals of such leases should be procured. In such case, the course is, to move the court, on notice, for a reference, grounded on an affidavit, which should briefly state the date, parties, names, premises, yearly rent, and term of the lease, the covenant for, and terms of renewal, (if any,) the death of the lives, and when; the right of the parties beneficially entitled to the renewal, and the reasons or necessity for obtaining such renewal. The order usually made directs a reference to the Master, to inquire and report whether it will be for the benefit of the parties that the receiver should proceed to obtain such renewal; and if so, to whom the same should be executed;* whether any are, and what arrears of rent,

* The renewal is usually executed to the person legally entitled; but in some cases, as where trustees, having the legal estate, have refused to act, it has been executed to the receiver in trust for the parties beneficially entitled. *Smith's Rec. n.* p. 89.

To whom executed.

renewal or septennial fines and interest due and payable on such renewal, what funds are applicable to the purposes of obtaining such renewal; and, if necessary, whether any and what proceedings should be taken to obtain same; and what funds are applicable to the costs of such proceedings; and that the receiver may be at liberty to proceed according to the master's report. *Edgeworth* v. *Taylor*, R. I. Nov. 1823. *Smith's Duty of Rec.* 88.

Where and how to be obtained.

If the Master reports favourably to the renewal, the receiver should cause renewals to be prepared, according to the directions in the report; and if the person who is bound to grant such renewal, on payment or tender of all arrears of rent, renewal, or septennial fines, and interest (if any,) refuses to execute same, a further application to the court, grounded on the report, and an affidavit of a refusal to execute, should be made; on which the court, if it sees fit, will order a formal tender of such renewal to be made; and if not executed, will direct the receiver to proceed to file a bill to enforce the execution of the renewal, *Edgeworth* v. *Taylor*, R. I., Jan. 1824, in which form the notice of the motion should be shaped. The costs of these proceedings will be allowed according to the Master's report. *Ib.* 89.

Before concluding the consideration of renewals, it may be observed, that if any of the tenants of the estate hold under leases for lives, with covenant for renewal, on payment of any pecuniary fine, all fines incurred or payable pending the existence of a receiver over the property, appear to be properly receivable by the receiver, and should be demanded as part of the issues and profits; but unless (which is seldom the case) the *tenant* is expressly bound by covenant to renew, payment could not be enforced. It might be otherwise where the tenant voluntarily renews with the inheritor, and pays him the fines. In such case the court would, it is conceived, order the inheritor to account. *Ib.* 90.

Palmer v. *Newport.*

21st June, 1824.

How a receiver should proceed where the lands

This was a motion by the receiver for a reference to the Master, to inquire whether any lives were named in the place of others which had dropped, and had been inserted in a lease for lives renewable for ever, under which

are held for lives renewable for ever, and some of the lives have dropped.

the lands in the pleadings mentioned were held, and what was due for renewal fines.

The *Master of the Rolls* observed, that the proper application in such a case as this, was to move for a reference to the Master, to inquire whether any lives had dropped, and whether it would be for the benefit of the parties that the receiver should proceed to obtain renewals, for any and what lives, in the place of the lives which had dropped, and if so, to report what sum was due for renewal fines, septennial fines, and interest, if any; and whether any, and what rent was due, and what were the funds properly applicable to pay the same, and to whom such renewal should be executed, and to approve of the draft of such renewal; and that the receiver should be at liberty to proceed according to the Master's report, in relation thereto, and have credit in passing his account for such payments as he should make pursuant to said report, and for the expenses and costs of the renewal and reference as against the funds reported applicable thereto, without further order. The order was made accordingly. 1 *Hog. R.* 133.

Extract from the Tables of Sir Isaac Newton, for renewing and purchasing Ecclesiastical Leases.

"I THINK it convenient to explain to the reader the following tables for renewing, p. 16, and also for purchasing of leases, shewing the values in years, quarters, months, and decimal parts of a month, and to shew how to add and subtract those sort of valuations; in order to which, I shall shew first, that the year is divided into 4 parts or quarters, every quarter into 3 months, and a month into 10 parts, called decimal parts; so that at £1 *per ann.* rent, it will be 5s. a quarter, 1s. 8d. a month and 2d. the tenth part of a month; and because a month contains 4 weeks, it will be 5d. a week, so that 5 decimal parts of a month being equal to 10d. are equal to 2 weeks; 3 decimal parts are but 1d. above a week, so that it is easy to convert the decimal parts of a month into weeks.

The reason why I used this way of valuation, was, because I thought it most familiar to those who were concerned in purchasing; and although this way of expressing the values is not so exact, as if they were expressed in decimals, or in pounds, shillings, and pence, &c., yet is the difference very inconsiderable, although there may be some-

times a decimal part of a month, or thereabouts, either under or over the exact value, yet is it not to be regarded in this sort of bargaining; seeing men, in giving or taking of fines, are not tied to any particular rate of interest so exactly as not to err a penny or two, although the rent be but 20s. per ann. and therefore when a fine is required of any person either for renewing or purchasing of a lease, the tables will shew exactly enough what rate of interest is allowed: so if any have a mind to give or take a fine according to a rate of interest proposed, they may do it near enough by the tables.—*Newton's Tables*, p. 2.

" *How to add together the Fines given in Years, Quarters, Months, and Decimal Parts of a Month.*

EXAMPLE.

	Y.	Q.	M.	d. pts.
Suppose I am to add these fines together, viz.	3	2	1	6
	2	3	1	7
Sum . . .	6	2	0	3

" First then I begin at the least denomination, that is at decimal parts of a month, and say, 7 and 6 is 13, I set 3 and carry 1 for the 10, because 10 decimal parts are 1 month; then I come to the months, and say, 1 that I carry and 1 is 2, and 1 is 3, I set down 0, and carry 1 for the 3, because 3 months make a quarter; then I come to the quarters, and say, 1 that I carry and 3 is 4, and 2 is 6, I set down 2 and carry 1 for the 4, because 4 quarters make a year; then I come to the years, and say, 1 that I carry and 2 is 3, and 3 is 6, which I set down, and so the sum is 6 years, 2 quarters, 0 months, and 3 decimal parts, as in the example.—*Ibid.*

" *How to subtract one from the other, the Fines given in Years, Quarters, Months, and Decimal Parts of a Month.*

EXAMPLE.

	Y.	Q.	M.	d. pts.
From	4	2	1	4
Take	2	2	2	6
Remains . . .	1	3	1	8

First, as in addition, I begin at the least denomination, and say, 6 out of 4 I cannot, wherefore I borrow 10, because 10 decimal parts make 1 month, and say 6 out of 14, and there remains 8, which I set down; then I come to the months, and say, 1 that I borrowed and 2 make 3, then I say, 3 out of 1 I cannot, wherefore I borrow 3, because 3 months make a quarter, and say 3 out of 4, and there remains 1, which I set down; then I come to the quarters, and say, 1 that I borrowed and 2 make 3, then 3 out of 2 I cannot, wherefore I borrow 4, because 4 quarters make a year, and say, 3 out of 6, and there remains 3, which I set down; and then go to the years, and say, 1 that I borrowed and 2 make 3, then 3 out of 4 and there remains 1; and so there remain 1 year, 3 quarters, 1 month, 8 decimal parts. These two examples of addition and subtraction being understood, it will not be difficult to do the like with any other of these sorts of valuations; and therefore I think it needless to exemplify any farther." *Newton's Tables.*

"The first table which offers itself for renewing of leases, is for the term of 21 years, it shows the value in years, quarters, months, and decimal parts of a month, as all the rest do; the first part of this table is calculated at £11 11*s.* 8*d.* 1*q.*$\frac{3}{10}$ per cent. per ann. compound interest; so that the fine for renewing 7 years lapsed, on the present worth of 7 years in reversion, not to begin till 14 are expired, is exactly 1 year's value; which fine, and consequently rate of interest, bishops, deans, and chapters, heads and fellows of most colleges in both universities, do observe in letting and renewing of their leases; but at other rates of interest, the fine for renewing 7 years lapsed, the table shows as followeth, viz.

The fine for renewing 7 years lapsed.

		Y.	Q.	M.	d.pts.		£	s.	d.
at	5 *per cent.* is	2	3	2	0	Which by the table of reduction at £10 yearly rent is	29	3	4
	6 *per cent.* is	2	1	2	6		24	13	4
	7 *per cent.* is	2	0	1	0		20	16	8
	8 *per cent.* is	1	3	0	3		17	15	0
	9 *per cent.* is	1	2	0	0		15	0	0
	10 *per cent.* is	1	1	0	3		12	15	0

The years *in esse* may be valued as a lease of so many years, as in a lease of 21 years, if 7 years are run out, then there are 14 *in esse*, whose value are as a lease of 14 years,

and may be found by the table for purchasing; or if you subtract the value of the years in reversion from the value of the whole lease, the remainder is the value of the years *in esse.*

To find the value of some of the years in reversion, as suppose 3 of the 7, I do thus, because 3 wants 4 of 7, I take the value of 4 years in reversion from the value of 7 in reversion, the remainder is the value of the 3 years required.

EXAMPLE.

	Y.	Q.	M.	d.p.
The value of 7 years in reversion, at £11 11*s.* 8*d.* 1*q.* $\frac{3}{4}$ *per cent.* is . . .	1	0	0	0
The value of 4 years in reversion at the same rate is	0	1	2	7
Which subtract				
Remains	0	2	0	3

Which remainder being given for a fine, will make up the lease to 17 years, that is, 3 added to 14.—*ib.*

NEWTON'S TABLE, FOR THE RENEWING OF ANY NUMBER OF YEARS LAPSED IN A LEASE FOR TWENTY-ONE YEARS, p. 16.

	£11 11*s.* 8*d.* 1*q.* $\frac{3}{10}$ *per ct.*				3 *per cent.*				4 *per cent.*			
Years lapsed.	Years.	Quarters.	Months.	Dec. parts.	Years.	Quarters.	Months.	Dec. parts.	Years.	Quarters.	Months.	Dec. parts.
1	0	0	1	2	0	2	0	4	0	1	2	2
2	0	0	2	5	1	0	1	0	0	3	1	7
3	0	1	1	0	1	2	1	9	1	1	1	4
4	0	1	2	7	2	0	2	9	1	3	1	3
5	0	2	1	6	2	3	1	2	2	1	1	5
6	0	3	0	6	3	1	2	7	2	3	1	9
7	1	0	0	0	4	0	1	4	3	1	2	5
8	1	0	2	6	4	3	0	3	4	0	0	5
9	1	1	2	5	5	1	2	5	4	2	1	7
10	1	2	2	7	6	0	1	9	5	1	0	2
11	2	0	0	3	6	3	1	6	5	3	2	0
12	2	1	1	3	7	2	1	5	6	2	1	1
13	2	2	2	8	8	1	1	7	7	1	0	5
14	3	0	1	8	9	0	2	2	8	0	0	3
15	3	2	1	3	9	3	2	9	8	3	0	4
16	4	0	1	5	10	3	1	0	9	2	0	9
17	4	2	2	5	11	2	2	3	10	1	1	7
18	5	1	1	3	12	2	1	0	11	1	0	0
19	6	0	0	9	13	2	0	0	12	0	1	7
20	6	3	1	5	14	1	2	3	13	0	0	8
Total value.					Total value.				Total value.			
	7	3	0	3	15	1	1	9	14	0	0	3

NEWTON'S TABLES, FOR THE RENEWING OF ANY NUMBER OF YEARS LAPSED IN A LEASE FOR TWENTY-ONE YEARS, p. 17.

	5 *per cent.*				6 *per cent.*				7 *per cent.*			
Years lapsed.	Years.	Quarters.	Months.	Dec. parts.	Years.	Quarters.	Months.	Dec. parts.	Years.	Quarters.	Months.	Dec. parts.
1	0	1	1	3	0	1	0	5	0	0	2	8
2	0	2	2	8	0	2	1	2	0	1	2	9
3	1	0	1	5	0	3	2	2	0	3	0	3
4	1	2	0	5	1	1	0	4	1	0	0	8
5	1	3	2	8	1	2	1	8	1	1	1	6
6	2	1	2	3	2	0	0	6	1	2	2	7
7	2	3	2	0	2	1	2	6	2	0	1	0
8	3	1	2	1	2	3	1	9	2	1	2	7
9	3	3	2	4	3	1	1	5	2	3	1	7
10	4	2	0	1	3	3	1	5	3	1	1	0
11	5	0	1	1	4	1	1	8	3	3	0	7
12	5	2	2	5	4	3	2	5	4	1	0	8
13	6	1	1	2	5	2	0	6	4	3	1	3
14	7	0	0	4	6	0	2	1	5	1	2	3
15	7	2	2	9	6	3	1	1	6	0	0	8
16	8	1	2	9	7	2	0	6	6	2	2	8
17	9	1	0	3	8	1	0	5	7	1	2	3
18	10	0	1	1	9	0	1	0	8	0	2	5
19	10	3	2	5	9	3	2	1	9	0	0	3
20	11	3	1	4	10	3	0	8	9	3	1	8
Total value.	12	3	0	8	11	3	0	1	10	3	1	0

The following considerations in reference to the previous tables is an extract from an explanation in reference thereto, purporting to be given by a Bishop of Chichester on behalf of the Church, respecting the scale of valuation on the renewal of Church Leases. The writer is of course an interested party; and his view must be taken with those deductions which naturally apply to a person so circumstanced; but still the extract will contribute to shew the scale contemplated by a friend of the Church at no very distant period.

The Value of Church and College Leases, considered, &c.

"Sir—You were in such a heat when I saw you last, upon account of the treatment you met with from a certain college, of whom you held an estate by a lease of 21 years, that you would not hear any thing that might be offered to abate your anger: but I hope, by this time, you are in a cooler mood, and can patiently read, and calmly consider, what you would not then hearken to; which, if you would vouchsafe to do, I persuade myself you will be convinced, that you were angry without a cause, and had reason to thank them for their kind usage, rather than blame them for any hardships they put upon you. Their crime, as you call it, was, that they had made a strict inquiry into the value of their estate, and had exacted from you somewhat more than one year's rent (after the reserved rent was deducted) for renewing a lease up to 21 years, whereof 7 were run out; this you said was more than their predecessors had done for the like term, and therefore you thought you had reason to resent their hard usage.

"Now taking it for granted, that you paid a little more than one year's rent, as you valued it, (though it was probably but one year's rent, according to their information,) yet, in such a case, I undertake to prove, past all denial, that they took but half what that term was worth, and but half as much as laymen usually take of one another; and consequently but half of what they might in justice have demanded and taken. For according to the nicest calculation, the rule for renewing 7 years lapsed in a lease of 21, supposing the interest of the money at £6 per cent. is near two years and a half's value (as may be seen by the table page 17). Now, where had been the injustice if they had demanded and taken according to this proportion? can you at this time put out your money upon land security, and have £6 per cent for it? Every body knows that mo-

ney may be had, on reasonable security, for £5 per cent. and probably it will be had for less in a little time. And seeing you are satisfied in the goodness of the title, you ought to have been not only content, but thankful too that your money was securely laid out upon lands, after the rate of £6 per cent. had they treated with you upon that foot. But when you consider, that by taking 1 year's value for the renewing of 7, they rated the money at £11 11s. 8d. $\frac{1}{4}$ per cent. you have more reason to wonder at their easiness or ignorance of the true value of their estates, than to blame them for any extortion. I agree with you, that churchmen and fellows of colleges should be better landlords than laymen are; that is, in point of *prudence*, it behoves them to be so: not, but, in *justice*, they have as much right to their legal dues as laymen have. But because men of letters and bodies corporate cannot so well manage their estates as laymen or a single person may do if they keep them in their own hands, or let them out at a rack-rent (especially when they are distant from them) I think it is an instance of discretion in them, to encourage all people to be willing to be their tenants, by leases of a considerable term of years, renewable at all times upon reasonable considerations.

But when this is allowed, I see no reason why the differences should be so great, that all that have dealings with them, should expect they should take less than half of what laymen do in the like cases, and less than half the real value of the thing

And therefore, if clergymen and fellows of colleges should treat with their tenants as if money was at £6 per cent. one would think the advantage was as much as could be reasonably expected; seeing £5 per cent. is legal interest, and all other persons value their estates according to that proportion. But when leases are sold after the rate of £6 per cent. the inheritance of lands, according to that proportion, ought to be sold at 16 or 17 years' purchase: and when all other persons value their estates at 20 years' purchase, or upwards, the advantage of dealing with such bodies, rather than private persons, is very apparent, if they should take even double to what they have taken of late years: for in such case they would value their estate at 3 or four years purchase less than other people do.

But it is plain, they have made no such alteration in their way of estimate, since money was 11 or 12 per cent. but have taken the same rates for 170 years, or upwards:

whereas the value of money has wonderfully decreased in that time.

Indeed, the lessees or tenants of such estates have set their landlords an example of valuing their estates, as if money was at £6 per cent. for they ordinarily sell a lease of 21 years for 12 years purchase; whereas churches and colleges who take but 1 year's value for 7 years expired in a lease of 21, do, in proportion, reckon the total value to be something under 8 years purchase, as may be seen in the first column of the table, page 16, which is calculated upon the supposition of money being £11 11s. 8¼d. per cent. Now, according to the proportion of 12 years purchase, or total value, the renewing of 7 years lapsed in such a lease, is worth near 2 years and a half's value; as appears from the second column of the table page 17, which is calculated upon the supposition of the interest of money being at £6 per cent. And I do not know any good reason that can be assigned, why colleges and churchmen should not put the same value on their estates as other men do, proportionably to the interest they have in them. Not that I know that any church or college designs to come up to this rule: I only observe, that if they should, their tenants could not justly accuse them of hard usage, seeing they would treat them by the same proportion as they treat with one another, and put no other value on their estates than they have taught them to do.

And should they insist upon such terms, yet still it would be better husbandry to buy church or college leases for 12 years' purchase, than to give 20 or 21 years purchase for lands of inheritance; because, in the former case, money is valued at £6 per cent. and in the latter at £5 or less.

But because all men will not attend to nice calculations, I will make it evident, by a plain familiar instance.

We will suppose the estate that is to be purchased £100 per annum, besides the reserved rent. Now if a man gives £1200 for a lease of 21 years of this estate, it is £800 or £900 less than he must give for an estate in fee; and consequently he has at least £800 to improve, though he has the same income as if he had laid out £2000 upon another estate.

Now the interest of £800 in 7 years, at £5 per cent. comes to £280. And if the church or college take for their fine £250, which is two years and a half value, that is still £30 less than the simple interest amounts to; but then the improvement of the interest, in 21 years time, will

amount to a considerable sum: but now, whilst a church or college takes but £100 or one year's value for their fine, it is less by £150 than the simple interest of the £800 comes to."—*Newton's Tables*, p. 79.

The following explanation and table, on the same subject, is taken from *Baily on the Renewing of Leases, &c.* published in 1807.

"The following Table is for the renewing of any number of years, lapsed, or expired, in a lease originally granted for twenty-one years, and is calculated according to the several rates of 3, 4, 5, 6, and 8 per cent. interest: the last column is at the rate of 11.564, or £11 11s. 3½d. per cent.; so that the fine to be paid for the renewal of seven years lapsed in such a lease, is exactly one year's purchase of the estimated rent of the estate; and consequently the proportionate value for renewing any other number of years, at the same rate of interest, will be as stated in that column. In order to shew the use and application of this Table, we shall propose the following examples."

Question 19. What sum ought to be given, as a fine, for the renewal of 10 years lapsed, or expired, in a lease for 21 years, allowing the tenant 5 per cent. interest for his money, and estimating the clear and improved rent of the estate at £60 per annum? Solution: In the Table, against 10 years, and under 5 per cent. we shall find 4.515, or rather more than 4½ years' purchase; and this, multiplied by 60, will produce 270.900, or £270 18s. for the fine which ought to be given accordingly. If it were the custom, or special agreement, to renew every seven years, on the payment of a fine equal to one year's purchase of the estate, then the fine which ought to be given, for renewing 10 years of such lease, will be found by multiplying 1.726 (or the value found against 10 years, in the last column,) by 60, which produces 103.560, or £103 11s. 2d. for the value of the fine in this case required.

Question 20. What sum ought to be given, as a fine, for renewing 14 years lapsed in a lease for 21 years, in order that the tenant may make 8 per cent. interest of his money; the improved rent of the estate being estimated at £94 per annum, out of which, however, the tenant pays a quit-rent of £8 7s. 6d. per annum? Solution: In the Table against 14 years, and under 8 per cent. we shall find 4.810, which is the number of years purchase; now the clear rent of the estate is evidently £85 12s. 6d. per annum; therefore, 4.810, multiplied by 85.625, will produce

411.856. or £411 17s. 1d. for the true fine required. If the rate of interest had been 4 per cent. the answer would have come out equal to £687 6s. 3d.—*Bayley on Leases*, p. 44.

FOR RENEWING ANY NUMBER OF YEARS LAPSED IN A LEASE FOR TWENTY-ONE YEARS. SEE PAGE 44.

Yrs.	3 p. Ct.	4 p. Ct.	5 p. Ct.	6 p. Ct.	8 p. Ct.	£11.564 p.Cent.
1	.538	.439	.359	.294	.199	.100
2	1.091	.895	.736	.606	.413	.213
3	1.661	1.370	1.132	.936	.645	.338
4	2.249	1.863	1.547	1.287	.895	.477
5	2.854	2.377	1.983	1.658	1.165	.633
6	3.477	2.911	2.441	2.052	1.457	.806
7	4.119	3.466	2.922	2.469	1.773	1.000
8	4.780	4.043	3.428	2.911	2.113	1.216
9	5.461	4.644	3.958	3.380	2.481	1.457
10	6.162	5.269	4.515	3.877	2.878	1.726
11	6.885	5.918	5.099	4.404	3.307	2.026
12	7.629	6.594	5.713	4.962	3.770	2.361
13	8.395	7.296	6.358	5.554	4.270	2.734
14	9.185	8.027	7.035	6.182	4.810	3.151
15	9.998	8.787	7.745	6.847	5.394	3.616
16	10.835	9.577	8.492	7.552	6.024	4.135
17	11.698	10.399	9.275	8.299	6.705	4.713
18	12.586	11.254	10.098	9.091	7.440	5.359
19	13.502	12.143	10.962	9.934	8.234	6.079
20	14.444	13.068	11.869	10.821	9.091	6.882
total.	15.415	14.029	12.821	11.764	10.017	7.779

Bayley on Leases, 114.

NEW STYLE.

In Ireland, the new style for the year began the day after 31st Dec. 1751, which was then called (not 1st Jan. 1751, as was formerly done, but) 1st Jan 1752.

And for the days, the day after 2nd Sep. 1752, which was then called (not 3d Sep. 1752, but) 14 Sep. 1752.

INTEREST.

In computing interest of money, or other payments which became due in England or Ireland on any day between 31st Dec. 1751, and 25th March, 1752, exclusive of these two days, it is to be remembered, that the year 1751,

by the alteration of the style or by authority of parliament, had no month of January, no month of February, and therefore no Hilary Term, nor had it the first 24 days of March. For that year ended on 31st. Dec. and not (as former years did end) on the 24th March: so there was only one year between the 1st Jan. 1750, and 1st Jan. 1752; or between 2d. Jan. 1750, and 2d Jan. 1752: and so on, every day, till last of all there was only one year between 24th March, 1750, and 24th March, 1752. But in Scotland their year always began 1st Jan.

Observe also, that Sept. in 1752 had none of the following days in England, Scotland, or Ireland, viz. Sept. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, or 13.—*Vide ante, p.* 157.

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